Supreme Court, U.S.
FILED

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No. 93-7795 JAN 24 1994

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WILLIAM EVANS-SMITH,

Petitioner,

V.

JOHN B. TAYLOR, WARDEN STAUNTON CORRECTIONAL CENTER,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the materiality test set forth in this Court's decision in U.S. v. Bagley, 473 U.S. 667 (1985) or the harmless error test set forth in Giglio v. United States, 405 U.S. 150 (1972), apply to the consideration of a due process claim based upon the prosecution's withholding of exculpatory evidence in violation of a trial court order for in camera inspection of such statements, coupled with prosecutorial use of similarly acquired non-exculpatory evidence at trial to convict.

2. Under a scheme in which the jury recommends the appropriate sentence, which may not be exceeded by the trial judge, is exculpatory evidence which might have created residual doubt as to guilt material?

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1993

NO. _____

WILLIAM EVANS-SMITH

Petitioner

v.

JOHN B. TAYLOR, WARDEN,
STAUNTON CORRECTIONAL CENTER

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE SUPREME COURT OF VIRGINIA

The Petitioner, William Evans-Smith, respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the Supreme Court of Virginia, entered in the above-entitled proceedings on October 26, 1993.

OPINIONS BELOW

The unpublished order by the Supreme Court of Virginia denying Petitioner's petition for appeal is reprinted in the Appendix. (App. 1A)[1] The trial court's order, letter opinion denying Petitioner's request for Writ of Habeas Corpus, and order denying reconsideration of said denial are also reprinted in the Appendix. (App. 2B, 4C, and 49D).

STATEMENT OF JURISDICTIONAL GROUNDS

The Supreme Court of Virginia denied Petitioner's appeal on October 26, 1993 from the Loudoun County, Virginia Circuit Court denial of his petition for Writ of Habeas Corpus. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1257.

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[1] Materials cited as "App. 1A" and following are contained in the Appendix under separate cover.

APPLICABLE PROVISIONS OF LAW

1. Sections 8.01-654, 18.2-10, and 18.2-32 of the Code of Virginia, as amended, are reprinted in pertinent part in the Appendix. (App. 51E, 56F and 55F).

2. The Fifth and Fourteenth Amendments to the Constitution of the United States are reprinted in the Appendix. (App. 57G and 58H).

STATEMENT OF THE CASE

A. The Proceedings Below

On April 23, 1985, a special grand jury sitting in Leesburg, Virginia, for the Circuit Court of Loudoun County directly indicted William Evans-Smith, charging him with the second degree murder of his wife, Barbara H. Evans-Smith, in violation of Section 18.2-32 of the Code of Virginia, as amended. On August 30, 1985, a jury verdict of guilty was

returned against Evans-Smith, and on January 16, 1986, he was sentenced to serve five years in the Virginia Department of Corrections.

Evans-Smith successfully appealed this conviction and the case was remanded for retrial at the Commonwealth's discretion. Evans-Smith v. Commonwealth, 5 Va. App. 188, 361 S.E. 2d 436 (1987).

Evans-Smith was retried on April 17, 1989, convicted, and sentenced by the trial court on August 11, 1989, consistent with the jury recommended verdict of 20 years. The Petitioner is presently serving said increased sentence in the Virginia Department of Corrections located in Staunton, Virginia.

Evans-Smith's petition for direct appeal was denied by the Virginia Court of Appeals on June 1, 1990, rehearing denied

on June 17, 1990, and by the Supreme Court of Virginia on September 14, 1990.

On March 29, 1991, Evans-Smith filed pursuant to Section 8.01-654 of the Code of Virginia, as amended, a petition for Writ of Habeas Corpus in the Circuit Court of Loudoun County, asserting that he was denied his constitutional right to a speedy trial. This petition was dismissed by the trial court on May 2, 1991, and the appeal was denied by the Supreme Court of Virginia on November 21, 1991.

A petition for a Federal Writ of Habeas Corpus was filed concerning issues of sufficiency of evidence, harsher sentencing, and a juror issue, which petition was denied by the U.S. District Court, Eastern District of Virginia, Alexandria Division, on February 28, 1992. However, Petitioner's appeal to the United

States Court of Appeals for the Fourth Circuit, is pending. A certificate of probable cause to appeal was granted May 13, 1993, and oral argument was heard December 9, 1993.

Petitioner filed a second state petition for Writ of Habeas Corpus on May 14, 1992, which petition is the subject of this petition for Writ of Certiorari. This habeas petition alleged that Evans-Smith was denied his constitutional right to due process by the Commonwealth's suppression of exculpatory evidence and/or because of newly discovered evidence. The petition was based upon the discovery by the defense of a previously unknown witness, Karen Spalding, who affied (App. 59I) that on the morning of the murder in question, between the hours of 7:30 a.m. and 8:00 a.m., she observed a suspicious,

blond haired man walking on Route 725 near the Evans-Smiths' farm gate as she passed that way by vehicle when taking her daughter to Lincoln Elementary School. She further affied that she was stopped during the April 16, 1985, road check by sheriff investigator Jay Merchant and was questioned about her observations the day before, and remembering later that day she had seen this suspicious man, she relayed the information to Merchant by telephone.

Respondent's initial response to this petition was a motion to dismiss, filed with an affidavit of Merchant (App. 64J). Merchant declared that his notes reflected a conversation with Spalding during the road check, and that he had **"no present recollection of a subsequent telephone call from Mrs. Spalding, and no notes or memoranda of such a telephone**

conversation." Moreover, Merchant affied that photostatic copies of his "notes from the road check, includng [sic] my note of my conversation with Mrs. Spalding and her full name, address, and telephone number, were given to Evans-Smith's defense counsel before trial pursuant to a discovery order of this Court."

At a trial court hearing held July 8, 1992, on the State's motion to dismiss, the Respondent's premise was that the circumstances of this case did not fall into the category of suppression of "exculpatory evidence," but that at best it was evidence that had not been preserved by the Commonwealth, arguing that habeas relief could only be granted upon the Petitioner's showing of bad faith on the part of the prosecution. In response, Petitioner filed an amended

habeas petition on July 29, 1992, (App. 69K), asserting a third basis for relief that the evidence purported to be "lost" by the investigator was lost due to bad faith on the part of the police, listing fifteen similar actions by police investigators in Petitioner's prosecution, reflecting a pattern of bad faith.

Respondent filed an amended answer to the amended petition, revealing that Merchant, **upon further review of his notes, found a notation (no more than five pages after the first entry in a relatively small notebook) of a call to Spalding he made on April 16, 1985**, which notes cryptically indicated that she reported seeing a white male with a reddish beard in his late twenties or early thirties, who was wearing a jean jacket, blue jeans, and a baseball hat,

and walking in the direction of Lincoln on the road passing the Evans-Smith's entrance gate on the Thursday or Friday before the murder. At a hearing held September 1, 1992, the Respondent joined in the Petitioner's request for hearing and **further represented to the trial court that it did not have any evidence that Merchant's road survey notes had in fact been disclosed to the defense.**

On January 12, 1993, a trial court hearing was held on the limited issues in the first two issues raised by the petition, i.e., suppression of exculpatory evidence and after discovered evidence. Upon hearing evidence, submission of exhibits, and argument of counsel, the trial court in its February 1, 1993, letter opinion made the following findings of fact concerning the criminal discovery

process in Commonwealth v. Evans-Smith, Criminal No. 4700 (App 14C-21C):

> "On May 3, 1985 defense counsel filed a discovery motion which included in paragraphs 2 and 3 thereof requests for exculpatory evidence under Brady vs. Maryland, 83 S.Ct. 1194 (1963) (Petitioner's Exhibit 4).
>
> "A hearing was held before Judge Carleton Penn on May 16, 1985 which concerned the defense discovery motion. From the representations of defense counsel to the Court at the hearing the Commonwealth was clearly aware that the defense knew that the Commonwealth had interviewed over fifty persons; the defense's investigation indicated that some of those persons had stated things that would not support the Commonwealth's theory of the case; that the defense was aware that the Commonwealth's case was entirely circumstantial; that the defense's theory was that person or persons other than Evans-Smith committed the murder; that the defense saw that the Commonwealth's investigation had narrowly focused only on Evans-Smith; and that the defense needed to follow up on exculpatory evidence right away.
>
> "As a result of that hearing the Court ordered the Commonwealth to produce exculpatory evidence, and ordered further that if there was any

doubt as to whether or not evidence was exculpatory, then it shall be presented to the Court for in camera inspection. See order entered 23 May 1985, Petitioner's Exhibit 6. It was to be a continuing order. The Court asked the Commonwealth to file its theory of the case confidentially with the Court to be used by it in inspecting any statements in camera.

"On May 16, 1985 trial was set to commence on August 13, 1985.

"The Commonwealth filed a written discovery response on May 23, 1985 which produced statements of the Petitioner, but not anyone else, and an "Answer to Motion for Exculpatory Evidence" which stated:

> 'None known to the Commonwealth at this time.'
>
> 'Pursuant to Court order all witness statements will be presented to the Court for in camera inspection.' (Petitioner's Exhibit 8)

"The Petitioner had hired his own private investigators to help him in his defense. The defense acquired information that two individuals had provided the Commonwealth with the reports of suspicious incidents close in time and place to the murder. As a result, a further discovery motion was filed on August 2, 1985 (Petitioner's Exhibit 9).

"A hearing was held before Judge Penn on August 5, 1985. He considered it to be an in camera pre-trial conference and excluded the public. Before the hearing Judge Penn had received from the Commonwealth its theory of the case as well as certain data of the knowledge of witnesses that could arguably be exculpatory. When Mr. Howard raised the issue of the defense's desire to have the Commonwealth produce "any reports regarding suspicious activity of vehicles and persons" (Transcript page 24, Petitioner's Exhibit 10), Judge Penn immediately went into reviewing approximately ten written reports of statements of persons previously supplied by the Commonwealth for in camera inspection. The Court ruled all these reports to be exculpatory and gave them to the defense. At least one of the statements concerned suspicious events that occurred approximately two weeks prior to the murder (the "Gefaell Statement" - see page 2 of Petitioner's Exhibit 12).

"Defense counsel brought up other information that had come to their attention about suspicious activity and its being reported to the Sheriff's Department. Judge Penn suggested that the defense ask for a subpoena duces tecum directed to the Sheriff's Department. The defense followed his suggestion.

"On August 8, 1985 a hearing was held before Judge Penn on the petitioner's request for a subpoena duces tecum to the Sheriff's Department for reports of suspicious vehicles and persons from March 15, 1985 to April 20, 1985. At the hearing Judge Penn ordered the production of all memoranda concerning statements made by Tracy Dillon and Elaine Monroe for in camera inspection and that the subpoena duces tecum be issued in usual form returnable the first day of trial, August 13, 1985.

"Evans-Smith's first trial commenced on August 13, 1985. On August 30, 1985 the jury found him guilty of second degree murder and fixed his punishment at five years in the penitentiary. He was sentenced, but his conviction was reversed by the Court of appeals on October 20, 1987. Evans-Smith vs. Commonwealth, 5 Va. App. 188 (1987).

"The Commonwealth decided to retry Evans-Smith. On January 11, 1988 the Petitioner filed a discovery motion which included a request for exculpatory evidence under Brady. (Petitioner's Exhibit 14). On January 21, 1988 the Commonwealth filed a written response stating:

> 'The Commonwealth is unaware of any evidence subject to the rules of discovery which was not provided or made known to the

defense either prior to or during the first trial of this case.' (Petitioner's Exhibit 15).

"The Commonwealth filed two supplemental discovery responses (Petitioner's Exhibits 16 and 17) but each concerned only statements of the Petitioner.

"This Court granted a suppression motion filed by the Petitioner. The Commonwealth appealed, and the Court of Appeals reversed. After the delay caused by this appeal, the second trial started on April 17, 1989. The jury returned its verdict on April 27, 1989.

"At no time did the Commonwealth reveal to the Petitioner or any of his attorneys the existence of Spalding's statements to Merchant on April 16, 1985. At no time did the Commonwealth produce any memorandum or notes of her statements to the Court for in camera inspection and ruling. Evans-Smith did not learn of Spalding's statements until May 1992." [Emphasis Added.] Letter Opinion, William Evans-Smith v. Taylor, Law No. 13577 (February 1, 1993).

The trial court, however, denied and dismissed all three claims in Petitioner's

Amended Writ of Habeas Corpus for the following stated reasons (App. 4C-5C):

> "(1) Even if the information given to Investigator Jay Merchant ("Merchant") by Karen Spalding ("Spalding") on the morning after the murder is considered after-discovered evidence, no relief is available under Fitzgerald vs. Bass, 6 Va. App. 38 (1988) because after-discovered evidence does not constitute a basis for habeas relief;
>
> "(2) The information given to Merchant by Spalding is clearly exculpatory evidence, but under United States vs. Bagley, 105 S.Ct. 3375 (1985) such evidence is not material; and
>
> "(3) The information given by Spalding to Merchant is exculpatory evidence coming under the doctrine of Brady vs. Maryland, 83 S.Ct. 1194 (1963) and its progeny and is not evidence, potentially useful to the defense but lost due to the bad faith of the police, under the doctrine of Arizona vs. Youngblood, 109 S.Ct. 333 (1988)."

On June 8, 1993, Petitioner filed a timely motion for reconsideration of the trial court's denial of his petition, presenting the arguments raised in this

Petition for Writ of Certiorari. The motion was denied by Order entered on June 14, 1993. (App. 49D). Petitioner timely appealed the denial of the requested Writ of Habeas Corpus to the Supreme Court of Virginia, raising the same constitutional challenges presented in this petition. On October 26, 1993, the Supreme Court of Virginia refused the petition for appeal in an unpublished decision. (App. 1A).

B. The Facts In This Case

On April 27, 1989, William Evans-Smith was convicted on wholly circumstantial evidence for the second time of the murder of his wife Barbara Evans-Smith. Mrs. Evans-Smith had been murdered in the couple's rural home on April 15, 1985, sometime between 4:00 a.m. and 8:00 a.m. Her autopsy revealed that she had died by strangulation, 30 to 60

minutes after last eating food consisting of vegetable or fruit material and seed topping commonly found on bread. The autopsy further revealed a subdural hematoma on the back of her head.

The Evans-Smiths' daughter, Lesleigh Cook, arrived at her parents' home about 11:00 a.m. that morning. When she entered the house, she noticed that one of her parents' dogs was closed in the entrance/utility room off the kitchen. Upon entering the kitchen, Cook found the kitchen table askew, a hutch pulled away from the wall, and one of her mother's slippers on the kitchen floor. After calling for her mother and getting no answer, Cook went into the hallway where she found the front door partially open, the hall table overturned, and her mother's other slipper. After calling out

again and not getting an answer she became so afraid she left the house the way she had come in. Cook testified that while driving down the driveway she called a friend, William Laycock, for help on her Citizens Band Radio. Cook drove to the entrance of the quarter mile long driveway and waited there for Laycock, who arrived with a friend, Robert Brown.

Brown found the victim in a second floor bedroom of the Evans-Smith home on the shag carpeted floor between the victim's bed and the door to the bathroom. A pair of panty hose was wrapped around her neck three times and knotted on the left front just below her jaw. Still dressed in her bed clothes, her robe was open, and a pair of panties placed in her mouth. Her bedroom was ransacked and

cluttered with items from closets and drawers.

In the Petitioner's bedroom, which was adjacent to the victim's bedroom (through an adjoining bathroom), the contents of two bureau-top boxes were found on the bed. There were two or three neckties on the floor of the closet, as well as a pair of slippers that were out of place. The rest of the house did not appear to have been ransacked.

In addition to the displaced furniture in the kitchen, crime scene technicians found what appeared to be two parallel "scratch marks" in the linoleum floor. There was one set of dishes on the kitchen table, with a birthday card, glasses case, address book, and a copy of that day's Washington Post newspaper. Another set of dishes was found in the

kitchen sink. The table in the hall-way at the foot of the stairs leading up to the bedrooms was overturned. An arrangement of silk flowers in a basket was lying on its side, with little or no debris from the flowers on the carpet.

State and local crime scene technicians seized several items found on scene, which were submitted to a state forensic laboratory for analysis, including human hair samples, the victim's night shirt and robe, a towel, and trash from the wastebasket in the couple's bathroom. However, due to crime scene investigative limitations testified to by the state's crime scene technician, fingerprints were <u>not</u> lifted from any areas in the house probably touched by the perpetrator(s) in the commission of this crime, including door knobs, the stair

railing, stair wall, many pieces of furniture, and numerous other items found disturbed in the house.

Sheriff investigators testified that they looked around the grounds surrounding the house, but had observed nothing of evidentiary value. However, Laycock testified he noticed tire tracks that morning leading from the house lawn through a hay field toward a distant side gate from the farm to a State road. Laycock further testified that he was familiar with the Evans-Smith farm and its crops and said that it would have been unlikely for Evans-Smith, a part-time farmer, to drive through this hay field. Cook also saw these suspicious tracks and believed she had mentioned it to the police at the scene that day.

Evans-Smith was advised of his wife's murder the afternoon of April 15, 1985, by Loudoun County sheriff investigators Jeff Brown and Jay Merchant at his office on upper Wisconsin Avenue, Washington, D.C. Upon being told his wife was dead, investigators said he asked several questions: whether she was raped, disfigured, clothed, and who found her. Brown testified that the Petitioner was showing some emotion of crying, but there were no tears in his eyes. Investigators testified that when they mentioned the appearance of a burglary, Evans-Smith gasped, "Oh my God, the van." He further mentioned a European wallet with ten $20.00 bills in it and hay sales money.

Evans-Smith told them that he had gotten up that morning a few minutes before 5:00 a.m., as was his custom and

that around 5:15 a.m. or 5:20 a.m. had driven down to the mail box at the entrance gate of the farm to get the morning Washington Post newspaper. When he was turning the car around, the beam of his headlights momentarily reflected off the windshield of a dark colored van that was parked on Route 725. He told investigators he returned to the house with the newspaper, which he left on the hood of the truck in the garage, and went out to feed their livestock. He then said he came back and joined his wife for a light breakfast of toast and coffee. After breakfast, Evans-Smith said he left his wife at the kitchen table reading the newspaper, went upstairs, showered, and dressed for work. When he came downstairs his wife was still at the kitchen table and she asked him to sign a birthday card

for their son-in-law, which he did. Investigators testified that at a later interview the Petitioner further related to them that his wife observed blood stains on his shirt sleeve. He said she washed the blood out of the sleeve while the Petitioner put a Band-Aid on his hand. Petitioner further told the investigators that he kissed his wife good-bye, and as he was drove out of the driveway, she waived good-bye to him from the upstairs bedroom window where she had gone to get their son-in-law's address out of an address book for the birthday card. There was testimony from a friend of the Evans-Smiths and from Cook that Petitioner, while relating the events of that morning to them, said his wife had waived good-bye to him from the kitchen window.

Petitioner said that he left for work no later than 6:30 a.m. and arrived at work, the Foreign Area Studies Department of The American University in Washington, D.C., at his normal time. He said that he had briefly stopped by the main campus of The American University just about 8:00 a.m. the morning of April 15, 1985, to drop off copies of a new book for the University's president, but the office was closed. He related that traffic was heavy on his way to work April 15, 1985, and that his route included the Washington Beltway (I-495) and the Cabin John (American Legion) Bridge, which at that time was undergoing major modifications. Concerning rush hour conditions the morning of April 15, Commonwealth witnesses involved with traffic oversight on the route in question testified there

were no unusual traffic delays that Monday morning, but that traffic was stop and go and unpredictable from day to day on this route. There was no evidence presented as to the time it would have taken to drive this route under comparable circumstances.

After notifying Petitioner of his wife's death, the investigators testified that he declined their offer to drive him home. Driving his own car, they followed him. Having been told by Brown and Merchant that he would not be able to go to his house, he first drove to his daughter's (Cook) house. After a brief visit with her, Petitioner drove to his farm and waited at the entrance gate. During his long wait, Petitioner made numerous requests to sheriff deputies and investigators to allow him to go up to the house to see his wife and was told that he

would be allowed to do so after the police finished their investigation. Witnesses testified that Petitioner became increasingly irritated as time passed and his requests were ignored, resulting in a highly emotional and physical encounter between him and two deputies. During the scuffle, one deputy noticed Petitioner biting his hand and that he was bleeding.

Sheriff deputies prevented Evans-Smith from returning to his home until late that evening. Upon arriving at the house, Petitioner was confronted by investigator Merchant, who asked him to accompany him through the house to indicate what items were missing. Petitioner cooperated. After proceeding through the house, Merchant asked him to prepare a list of things he thought were missing, once Petitioner's was given a list of what the

evidence technicians had taken. On the following day and the second following day, the Petitioner called the sheriff's office without success for the inventory.

Brown and Merchant scheduled a meeting with Evans-Smith on April 17, 1985, representing that they would give him the inventory of items taken from the house. The meeting turned into an extended interrogation of the Petitioner, during which he repeated much of the information previously provided them. The investigators testified that he mentioned for the first time that his wife kept her heirlooms, valuable jewelry, and their hay receipts in an aqua colored jewel box in her bedroom. It was later determined that this jewel box was not one of the items seized by the crime scene investigators, and it was found, approximately two weeks

later by a farm worker in the Evans-Smiths' corn field near the access gate to which vehicle tracks led from the house yard.

At the conclusion of the April 17, 1985, interrogation, Evans-Smith was strip searched and examined by Dr. Michael E. Solin, a county medical examiner, and pictures were taken of his body. This examination revealed four parallel scratch marks on the backside of Petitioner's upper arm and some scratches on the backs of his hands. The Petitioner told investigators that he had not realized his upper arm was scratched and told them he had been clearing the fence rows on their farm of thorny locust and wild rose bushes the Saturday before the murder.

Solin testified that the scratches on Petitioner's hands were not consistent

with fingernail scratches, but that those on the Petitioner's upper arm could have been caused by fingernails, including in his opinion the fingernails of the victim. Contrary conclusions were drawn by two other expert witnesses, who testified for the prosecution: Loudoun County Medical Examiner George T. Hocker and Deputy Chief Medical Examiner of the Virginia Office of the Chief Medical Examiner Dr. James C. Byer, both of whom testified that the scratches on the Petitioner's hands and arm were made by a very sharp object such as a thorn, and further described the victim's fingernails as incapable of inflicting such scratches due to the way they were closely manicured.

The forensic evaluation of blood, hair, and fibers revealed that hair samples were collected on only three of

the 13 wooden stair steps to the upper floor bedrooms (steps 5, 8, and 11). State forensic expert Deanna Dabbs reported that of the 14 hairs found on the stairs three were found consistent with the victim (one of which was forcibly removed), 10 were unidentifiable because they were gray (one of which was forcibly removed), **and one blond head hair was found belonging to neither the victim nor the Petitioner**. None of the hairs found on the steps was identified as consistent with the Petitioner's hair type. The blond head hair was found on the eighth step with one gray hair and one of the victim's hairs.

Dabbs testified that 59 other individual hair samples were analyzed from the victim's bedroom. Of those 59 samples, 39 were consistent with the

victim's hair type and seven with Petitioner's. Most unusual, however, was the recovery of one brown caucasian head hair from the victim's left hand, which belonged to neither the victim nor the Petitioner and five hair samples taken from the victim's pubic combings which tested dissimilar in certain aspects to the victim's hair type but which clearly were not the Petitioner's.

The brown caucasian head hair was taken from the paper evidence bag which had enclosed the victim's left hand. The crime scene technician who enclosed the hand in this evidence bag testified that its purpose was to retain evidence therein. He further testified that the victim's hand was closed when the bag was placed around it, indicating that the hair had been contained within the closed hand

and excluding the possibility of it having arrived there from someone who may have entered her room after her murder. This was the same hand Dr. Byer testified was used by the victim in an attempt to release the panty hose ligature, causing the deep gouges found on her throat.

NONE of the samples in evidence of Petitioner's hair was determined by Dabbs to have been forcibly removed.

At trial Petitioner's defense focused on others having murdered his wife, particularly a couple of suspicious individuals who were at the adjacent farm the morning of the murder. The defense introduced evidence from a neighbor of the Evans-Smiths, who lived opposite the entrance to their driveway, who testified that she recollected hearing and seeing a dark colored vehicle hurriedly departing

the Evans-Smiths' driveway the morning of the murder between 9:00 a.m. and 11:00 a.m. The car stopped at the entrance way and the occupant got out at the farm gate, walked around some, got back into their vehicle and quickly drove away.

Petitioner himself had told investigators of his seeing a suspicious van parked on Route 725 early the morning of the murder. Additionally, a citizen named Tracy Dillon testified that she had reported to the sheriff's office a strange encounter with a speeding dark colored van with two passengers with Louisiana plates about 8:30 a.m. the morning of the murder, a short distance from the Evans-Smiths' farm.

The morning following the murder (April 16, 1985), investigator Merchant had conducted a road check at the Evans-

Smith's entrance gate on Route 725 between the hours of 4:00 a.m. and 8:30 a.m., stopping and interviewing some 22 passers-by. **The Commonwealth presented eight witnesses at both trials, who testified that they passed Evans-Smiths' entrance gate on Route 725 between the hours of 4:00 a.m. and 8:00 a.m. on the morning of April 15, 1985, but saw no van or anything else unusual on the road that morning.**

What the Commonwealth did not reveal is that one of the parties stopped during the very same road check, one Karen Spalding, did report seeing something unusual.

At the hearing on Evans-Smith's petition for a Writ of Habeas Corpus held January 12, 1993, Spalding testified (App. 84L-102L and 114L-119L) that **she told Merchant that she had seen someone walking**

on the Route 725 just prior to the Evans-Smith's entrance gate towards Lincoln, the day before the road check. She testified the person was wearing jeans, a jean jacket, white T-shirt, and blondish-brown hair. He wasn't carrying anything, and she believed he had his head down. She further testified that it was unusual to see anyone on that road because it was very rural. In corroboration of her testimony, Spalding's husband testified that she had reported to him about the road check and her call to Merchant, and he specifically remembered her telling him about seeing the man on the road the day of the murder. (App. 102L-114L).

In the letter opinion of February 1, 1993, the trial court after hearing evidence upon the Petitioner's Writ of Habeas Corpus, made the following Findings

of Fact in regard to the Spalding report (App. 8C-13C):

> "As a part of the investigation of the murder, Merchant conducted a "road check" on Route 725 near the Evans-Smith farm early on the morning of Tuesday, April 16, 1985. At the time Merchant knew that Barbara had been murdered in the residence on the farm the previous day (April 15, 1985), and had been told by Dr. George Hocker, the Loudoun County Medical Examiner, that he estimated her time of death to have been 6:00 to 6:30 a.m. give or take one to two hours. Merchant arrived for the "road check" at about 4:30 A.M. and stayed until about 8:30 A.M.
>
> "During the 'road check' Merchant stopped every vehicle to determine if anyone saw or heard anything at the time the murder occurred. He stopped a total of 22 vehicles, and he made notes concerning each vehicle he stopped. The notes were made in a spiral bound notebook. He made notes at the time he spoke to the occupants of each vehicle he stopped. He identified the notebook at the hearing, but the notebook itself was not admitted into evidence.
>
> "Karen Spalding and her family were living in April 1985 at a house on route 725 a short distance east of the Evans-Smith farm. The Spalding

family was living there temporarily while their fire damaged house near Purcellville was being repaired. Spalding's daughter attended Lincoln Elementary School in Lincoln, Virginia which is west of the Evans-Smith farm.

"The morning of April 16, 1985 Spalding was driving her daughter to school when she was stopped on Route 725 near the Evans-Smith property by Merchant. She was headed west on Route 725 toward Lincoln Elementary School when she was stopped at 7:36 A.M. He asked and obtained from Spalding her name, address and telephone number. He asked her how often she travelled Route 725 and on what days. She told him that she usually came by about 8:00 A.M. taking her daughter to school. He told her that there had been a murder and asked if she had seen or heard anything. She replied negatively. He gave her his card and asked her to call him if she knew anything. Merchant made contemporaneous notes of his stops of Spalding (Respondent's Exhibit 2).

"Spalding worked in McLean, Virginia in April 1985. She proceeded to work after dropping off her daughter at school. She had to be at work by 9:00 A.M. Sometime after the stop, but the same day, Spalding remembered having seen someone walking on Route 725 near the Evans-Smith farm. Later the same day

[April 16, 1985] Merchant returned the call to her.

"In the telephone conversation Spalding told Merchant that on the previous Thursday or Friday she saw a person walking on Route 725 toward Lincoln near the Evans-Smith farm at about 8:00 A.M. She told him that it was a white male wearing a jean jacket, jeans and a baseball hat. She said he was in his late 20's or early 30's and had a reddish-brown beard. Merchant told her that someone would get back in touch with her, but no one ever did. Merchant made contemporaneous notes of this conversation (Respondent's Exhibit 4).[2]

"Merchant made his notes of both the stop and telephone conversation in the same notebook. He had notes of all 22 vehicle stops of which Spalding's stop was the tenth. On the next page of the notebook after the notes of the twenty-second stop are Merchant's notes of his telephone conversation with Spalding.

"Although Spalding talked with her husband the evening of April 16, 1985 about these events, she did not discuss them with anyone other than

---

[2] The factual conclusions stated in this paragraph are contested by the testimony presented by Karen Spalding and her husband. (App. 84L-119L).

> him until May 1992. In November 1991 Spalding went to work for the law firm of David H. Moyes, one of the attorneys who had represented Evans-Smith at trial. In May 1992 during a discussion with a co-worker at the law firm Spalding mentioned the events of April 16, 1985. As a result, this information was provided to present counsel for the Petitioner and led to the filing of this habeas petition.
>
> "Spalding does not know Blair D. Howard, the other attorney who represented the Petitioner at trial, and she does not know the Petitioner."

Upon these factual findings and the underlying discovery history in the criminal trial, the trial court found the Spalding evidence exculpatory. The trial court, however, erroneously applying the United States v. Bagley, supra, "reasonable probability" standard of materiality found that, based upon the jury's position regarding other exculpatory evidence, there was not a reasonable probability that this evidence

would have altered the result of the trial.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S CONVICTION VIOLATED THE DUE PROCESS CLAUSE BECAUSE THE EXCULPATORY EVIDENCE SUPPRESSED BY THE PROSECUTION WAS CONSTITUTIONALLY MATERIAL UNDER THE HARMLESS ERROR STANDARD OF GIGLIO V. UNITED STATES, 405 U.S. 150 (1972); NAPUE V. ILLINOIS, 360 U.S. 264 (1959), MOONEY V. HOLOHAN, 294 U.S. 103 (1935).

Where there has been a deliberate misrepresentation of evidence to a jury and court in a criminal case, as opposed to a simple omission of exculpatory evidence, the constitutional test to determine the materiality of the suppressed evidence is not the standard of United States v. Bagley, 473 U.S. 667 (1985)[3] but the harmless error standard

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[3] The materiality test developed for the Bagley set of circumstances is whether there is a "reasonable probability" that had the suppressed evidence "been

developed in the Mooney v. Holohan, 294 U.S. 103 (1935), line of cases, i.e. whether the Spalding evidence **"could in any reasonable likelihood have affected the judgment of the jury."** [Emphasis Added.] Giglio v. United States, 405 U.S. 150, 154 (1972); See also U.S. v. Mele, 462 F.2d 918 (2nd Cir. 1972); Miller v. Pate, 386 U.S. 2 (1967); Napue v. Illinois, 360 U.S. 264 (1959); and Mooney v. Holohan, supra. Cf. United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982) (prosecution deported defense witness).

The Petitioner asserts that the Supreme Court of Virginia erred by not requiring the trial court to evaluate the

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disclosed to the defense, the result of the trial would have been different." Bagley, supra.

Spalding evidence as to his guilt against this standard.

In the flagship case of Mooney v. Holohan, supra, this Court established that the Due Process:

> "...requirement, in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. [citations omitted]. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing **if state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of the court and jury by the presentation of testimony known to be perjured.** Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." [Emphasis Added.] Id. 294 U.S. at 112.

The underlying rationale of Mooney was later elaborated upon in Brady v. Maryland, 373 U.S. 83, 87-88:

> "The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.... **A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile'...."** [Emphasis Added.]

In the 1959 case of Napue v. Illinois, supra 360 U.S. at 271, the "reasonable likelihood" test of materiality was crafted, which test has since been applied in cases where a deliberate misrepresentation has been made to the court and jury.

The reasoning underlying the standard is well explained in the 1972 decision of

the United States Court of Appeals for the Second Circuit in the case of U.S. v. Mele, supra at 924:

> "...Due process requires...that a different rule be applied when prosecutorial suppression has caused the evidence not to be presented at trial. **At least where the suppression is deliberate, the defendants need only to show that the evidence is material and could in any reasonable likelihood have led to a different result on retrial.** Giglio v. United States, 405 U.S. 150, 154, 92 S.t. 763. [Citations omitted]. In these cases, where there has been a considered decision to suppress and where the value of the information 'could not have escaped the prosecutor's attention,' United States v. Keogh, supra, at 147, it is not necessary to engage in any exact determination of the degree of prejudice to the defendants." [Emphasis added].

Even in its opinion in United States v. Bagley, supra 473 U.S. at 679, this Court recognized that it was not replacing the "reasonable likelihood" standard of review with the "reasonable probability" test. In fact this Court elaborated that:

> "The Supreme Court has stated that this standard [i.e. reasonable likelihood standard] is equivalent to the "harmless beyond a reasonable doubt" standard established in Chapman v. California, 386 U.S. 18, 24 (1967)." Id.

The evidence presented to the trial court as reflected in the record before this Court is that: (1) defense counsel **specifically requested the exculpatory information**; (2) the first trial court **ordered that exculpatory evidence would be reviewed in camera**; (3) the Commonwealth misrepresented [orally and in writing] to both the court and defense counsel **that it had released "all" witness statements to the Court for in camera review**; and (4) the Commonwealth **presented misleading testimony at trial of eight individuals,**[4]

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[4] At both trials, the Commonwealth presented testimony of the following eight witnesses: Keith Dennis, Lawrence Robey, Ralph Clarke, Mark Simms, Bill Packard, Samuel Brown, Bart F. Johnston, III, and

including five interviewed in the April 16, 1985, road check, who saw no suspicious vehicles or persons to prove "beyond a reasonable doubt" that Evans-Smith murdered his wife.

The use of this evidence, without the disclosure of Spalding's report to Merchant and consequently Spalding's actual observations, effectuated a deliberate misrepresentation to the Court and jury of the truth.[5]

James Anderberg to establish a chain of evidence eliminating other suspects, and in particular to impeach the Petitioner's sighting of a van parked on Route 725 early the morning of the murder. All testified seeing no van or horse trailer on the road that morning and none of them testified to seeing anything else of importance on their way down that road the morning of the murder or any other time in close proximity thereto.

[5] By virtue of the following statement in its letter opinion of February 2, 1993, the trial court recognized the deliberateness of the prosecution's suppression (App. 32C-33C):

At both trials, the Petitioner denied any role in his wife's death, and the defense brought out as best it could evidence of others who were in a position to commit the murder. Spalding's evidence would have in fact connected a suspect directly to the crime scene, which suspect

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"... this court cannot just merely look away from the circumstances of the nondisclosure when it considers the importance of the Evans-Smith prosecution, the severity of the offense, the defense's theory at trial, the continuing protestation of innocence by Evans-Smith, the rulings of Judge Penn before the first trial as to other information he deemed exculpatory and the involvement of an experienced prosecutor and investigator. In its first written discovery response the Commonwealth even stated that it would present all witness statements to the Court for in camera inspection, but obviously it did not do so. **Considering the pre-trial circumstances of this case, it is very difficult to understand the failure to produce Spalding's statements to the defense."** [Emphasis Added].

had not been previously identified as being in the vicinity of the crime scene.[6] Consequently, the Petitioner asserts that under a proper materiality test, the suppression of the Spalding evidence amounted to a constitutional deprivation of his right to due process.

The tenuousness of Evans-Smith's conviction as a result of this unconstitutional suppression is reflected in the observations of the Virginia Court of Appeals in its reversal of Petitioner's first conviction, where it was observed

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[6] At the underlying criminal trial, defense counsel had brought out evidence of two Mexican/American horse trainers who were at the adjacent farm within the time frame of the murder, who gave contradictory testimony as to their whereabouts and activities the morning of the murder. However, the forensic testimony at the second trial eliminated these two individuals from being the caucasian person or persons who left the hairs found at the crime scene.

that the totality of the evidence of his guilt was "not so overwhelming as to establish the guilt of the accused beyond a reasonable doubt...." so as to justify the improper use of hearsay as harmless error. [Emphasis Added.] Evans-Smith v. Commonwealth, supra, 361 S.E.2d at 445. Petitioner's second trial contained neither additional nor substantively different evidence of Petitioner's guilt than the first.

II. PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED BECAUSE CONSTITUTIONALLY MATERIAL EXCULPATORY EVIDENCE, SUPPRESSED BY THE PROSECUTION, WAS NOT AVAILABLE TO THE JURY TO WEIGH AS TO THE ISSUE OF PETITIONER'S PUNISHMENT. BRADY V. MARYLAND, 373 U.S. 83 (1963).

In Virginia, a criminal defendant is entitled to two decisions on his sentence, one by the jury and one by the judge. Vines v. Muncy, 553 F.2d 342 (4th Cir.), cert. den., 434 U.S. 851 (1977). The jury

sets the maximum sentence, and the trial judge has only the power to suspend all or part of that sentence.

Due process requires that when exculpatory evidence has been suppressed by the prosecution, the reviewing court must determine materiality of the suppressed evidence as to punishment as well as guilt. Petitioner asserts that the Supreme Court of Virginia erred by not requiring the trial court to evaluate the Spalding evidence in that light, and to do so against the harmless error standard of Giglio v. United States, supra. Petitioner contends that the Spalding evidence at the very least might have created a residual doubt as to Petitioner's guilt, and therefore affected the jury's position on sentencing.

In Brady v. Maryland, supra, the Maryland Court of Appeals had denied an appeal on the issue of suppression of exculpatory evidence regarding the guilt of Brady, but had remanded the case to be evaluated upon the effect the suppressed evidence could have upon the jury's imposition of punishment. This Court upon review of the decision affirmed, ruling that:

> "...the suppression by the prosecution of evidence favorable to an accused **upon request violates due process where the evidence is material either to guilt or to punishment** irrespective of the good faith or bad faith of the prosecution." [Emphasis Added.] Id. 373 U.S. 87.

Although the trial court in Petitioner's cause stated this premise in its letter opinion, it did not address the issue of punishment in its opinion. (App. 22C-23C).

In Evans-Smith's case, the jury in the first trial set his sentence at the minimum of five years. The jury in the second trial set his sentence at the maximum of 20 years.[7] Because the case against the Petitioner was entirely circumstantial and both juries imposed, upon essentially the same evidence, very different sentences, there is a reasonable likelihood that Spalding's testimony could have had an effect upon the jury's ultimate determination of punishment, even

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[7] The constitutionality of the imposition of the harsher sentence on retrial was challenged by direct appeal by Evans-Smith under the premise of North Carolina v. Pearce, 395 U.S. 711 (1969). However, the Virginia Court of Appeals denied said appeal, ruling that as a "jury sentencing" state, the Pearce rule does not apply by virtue of Chaffin v. Stynchcombe, 412 U.S. 17 (1973). Evans-Smith v. Commonwealth, Record No. 1268-89-4 (Va. App. June 1, 1990), aff'd Virginia Supreme Court (Record No. 901018, September 14, 1990).

if it may not have affected the jury's finding of guilt.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the Supreme Court of Virginia entered in the above-entitled proceeding.

Respectfully submitted,
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October, 1993 TERM

Supreme Court, U.S.
FILED

No. 93-1195

JAN 24 1994
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WILLIAM EVANS-SMITH,

Petitioner,

V.

JOHN B. TAYLOR, WARDEN STAUNTON CORRECTIONAL CENTER,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Virginia

APPENDIX

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APPENDIX (VOLUME II)

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 26th *day of* October, 1993.

William Evans-Smith, Appellant,

against Record No. 930920
Circuit Court No. L-13577-H.C.

John B. Taylor, Warden, etc., Appellee.

From the Circuit Court of
Loudoun County

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,
Teste:
David B. Beach, Clerk
By: /s/
Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT OF LOUDOUN COUNTY

WILLIAM EVANS-SMITH	)	
	)	
Petitioner,	)	
	)	
vs.	)	AT LAW NO. 13577
	)	
JOHN B. TAYLOR, WARDEN, STAUNTON CORRECTIONAL CENTER,	)	
	)	
Respondent.	)	

FINAL ORDER

Upon consideration of the pleadings and exhibits filed, the record of petitioner's criminal trial and appeal, and the evidence taken and arguments of counsel heard on January 12, 1993, the Court hereby makes findings of fact and conclusions of law as specified in the Court's letter opinion of February 1, 1993, which is incorporated by reference herein.

For the reasons stated in the Court's letter opinion of February 1, 1993, the Court is of the opinion that petitioner is not entitled to the relief sought, and it is hereby ORDERED and ADJUDGED that the petition for writ of habeas corpus is denied and dismissed. Petitioner's exception is noted.

It is further hereby ORDERED that the Clerk serve by mail certified copies of this Order upon the petitioner, the respondent, Ann B. Vance, Esquire, co-counsel for petitioner, John H. McLees, Jr., counsel for respondent.

Enter this 25th day of May, 1993.

/s/ James H. Chamblin
JAMES H. CHAMBLIN, JUDGE

VIRGINIA: IN THE CIRCUIT COURT OF LOUDOUN COUNTY

WILLIAM EVANS-SMITH	)	
	)	
Petitioner	)	
	)	
vs.	)	LAW NO. 13577
	)	(Petition for
JOHN B. TAYLOR, WARDEN	)	Writ of Habeas
STAUNTON CORRECTIONAL CENTER	)	Corpus
	)	
Respondent	)	

SUMMARY OF RULING ON PETITION FOR WRIT OF HABEAS CORPUS

As set forth in detail under Findings of Fact and Conclusions of Law, the Amended Petition for Writ of Habeas Corpus is denied and dismissed for the following reasons:

(1) Even if the information given to Investigator Jay Merchant ("Merchant") by Karen Spalding ("Spalding") on the morning after the murder is considered after-discovered evidence, no relief is available under Fitzgerald vs Bass, 6

Va. App. 38 (1988) because after-discovered evidence does not constitute a basis for habeas relief;

(2) The information given to Merchant by Spalding is clearly exculpatory evidence, but under United States vs. Bagley; 105 S.Ct. 3375 (1985) such evidence is not material; and

(3) The information given by Spalding to Merchant is exculpatory evidence coming under the doctrine of Brady vs. Maryland, 83 S.Ct. 1194 (1963) and its progeny and is not evidence, potentially useful to the defense but lost due to the bad faith of the police, under the doctrine of Arizona vs. Youngblood, 109 S.Ct. 333 (1988).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a jury trial this Court on August 11, 1989, sentenced the Petitioner,

William Evans-Smith ("Petitioner" or "Evans-Smith") consistent with the jury verdict to 20 years in the penitentiary on a conviction of second degree murder of his wife, Barbara Evans-Smith ("Barbara"). The Petitioner's petition for direct appeal was denied by the Court of Appeals on June 1, 1990 and by the Supreme Court of Virginia on September 14, 1990.

On May 14, 1992 Evans-Smith filed herein a petition for writ of habeas corpus attacking his conviction on the basis of what he alleges as newly discovered material exculpatory evidence not disclosed to him prior to trial. The evidence concerns statements made to Investigator Jay Merchant ("Merchant") of the Loudoun County Sheriff's Department by Karen Spalding ("Spalding") the morning following the murder about a person she

had seen walking on the road near the gate to the Evans-Smith farm where Barbara had been murdered.

As a result of a hearing herein on July 8, 1992 on the Respondent's Motion to Dismiss the original Petition, the Court allowed the Petitioner to amend his petition. He filed an Amended Petition on July 29, 1992, to which the Respondent filed an Answer on September 8, 1992. The Amended Petition alleges that the Spalding statements are both material exculpatory and after-discovered evidence, but if they are not deemed such, then they are potentially useful evidence lost due to the bad faith of the police under Arizona v. Youngblood, 109 S.Ct. 333 (1988).

On September 21, 1992 this Court set a hearing to determinene what information was given to Merchant by Spalding and

whether the facts concerning Spalding's report to Merchant were available to Evans-Smith so as to have been included in his prior habeas corpus proceeding. The hearing was held on January 12, 1993.

I. FINDINGS OF FACT

A. Spalding Report

As a part of the investigation of the murder, Merchant conducted a "road check" on Route 725 near the Evans-Smith farm early on the morning of Tuesday, April 16, 1985. At the time Merchant knew that Barbara had been murdered in the residence on the farm the previous day (April 15, 1985), and had been told by Dr. George Hocker, the Loudoun County Medical Examiner, that he estimated her time of death to have been 6:00 to 6:30 A.M. give or take one to two hours. Merchant

arrived for the "road check" at about 4:30 A.M. and stayed until about 8:30 A.M.

During the "road check" Merchant stopped every vehicle to determine if anyone saw or heard anything at the time the murder occurred. He stopped a total of 22 vehicles, and he made notes concerning each vehicle he stopped. The notes were made in a spiral bound notebook. He made notes at the time he spoke to the occupants of each vehicle he stopped. He identified the notebook at the hearing, but the notebook itself was not admitted into evidence.

Karen Spalding and her family were living in April 1985 at a house on Route 725 a short distance east of the Evans-Smith farm. The Spalding family was living there temporarily while their fire damaged house near Purcellville was being

repaired. Spalding's daughter attended Lincoln Elementary School in Lincoln, Virginia, which is west of the Evans-Smith farm.

The morning of April 16, 1985 Spalding was driving her daughter to school when she was stopped on Route 725 near the Evans-Smith property by Merchant. She was headed west on Route 725 toward Lincoln Elementary School when she was stopped at 7:36 A.M. He asked and obtained from Spalding her name, address and telephone number. He asked her how often she travelled Route 725 and on what days. She told hi that she usually came by about 8:00 A.M. taking her daughter to school. He told her that there had been a murder and asked if she had seen or heard anything. She replied negatively. He gave her his card and asked her to call

him if she knew anything. Merchant made contemporaneous notes of his stops of Spalding (Respondent's Exhibit 2).

Spalding worked in McLean, Virginia in April 1985. She proceeded to work after dropping off her daughter at school. She had to be at work by 9:00 A.M. Sometime after the stop, but the same day, Spalding remembered having seen someone walking on Route 725 near the Evans-Smith farm. She called and left a message for Merchant to call her. Later the same day Merchant returned the call to her.

In the telephone conversation Spalding told Merchant that on the previous Thursday or Friday she saw a person walking on Route 725 toward Lincoln near the Evans-Smith farm at about 8:00 A.M. She told him that it was a white male wearing a jean jacket, jeans and a

baseball hat. She said he was in his late 20's or early 30's and had a reddish-brown beard. Merchant told her that someone would get back in touch with her, but no one ever did. Merchant made contemporaneous notes of this conversation (Respondent's Exhibit 4).

Merchant made his notes of both the stop and the telephone conversation in the same notebook. He had notes of all 22 vehicle stops of which Spalding's stop was the tenth. On the next page of the notebook after the notes of the twenty-second stop are Merchant's notes of his telephone conversation with Spalding.

Although Spalding talked with her husband the evening of April 16., 1985 about these events, she did not discuss them with anyone other than him until May 1992. In November 1991 Spalding went to

work for the law firm of David H. Moyes, one of the attorneys who had represented Evans-Smith at trial. In May 1992 during a discussion with a co-worker at the law firm Spalding mentioned the events of April 16, 1985. As a result, this information was provided to present counsel for the Petitioner and led to the filing of this habeas petition.

Spalding does not know Blair D. Howard, the other attorney who represented the Petitioner at trial, and she does not know the Petitioner.

B. Proceedings Before Trial

Evans-Smith was directly indicted only eight days after the murder. He was released on bond. Because he was indicted directly, Evans-Smith did not have the benefit of a preliminary hearing. He remained free on bond until the jury at

his second trial found him guilty on April 27, 1989. The Petitioner has been in custody since that date.

On May 3, 1985 defense counsel filed a discovery motion which included in paragraphs 2 and 3 thereof requests for exculpatory evidence under Brady vs. Maryland, 83 SCt. 1194 (1963)(Petitioner's Exhibit 4).

A hearing was held before Judge Carleton Penn on May 16, 1985 which concerned the defense discovery motion. From the representations of defense counsel to the Court at the hearing the Commonwealth was clearly aware that the defense knew that the Commonwealth had interviewed over fifty persons; that the defense's investigation indicated that some of those persons has stated things that would not support the Commonwealth's

theory of the case; that the defense was aware that the Commonwealth's case was entirely circumstantial; that the defense's theory was that person or persons other than Evans-Smith committed the murder; that the defense saw that the Commonwealth's investigation had narrowly focused only on Evans-Smith; and that the defense needed to follow up on exculpatory evidence right away.

As a result of that hearing the Court ordered the Commonwealth to produce exculpatory evidence, and ordered further that if there was nay doubt as to whether or not evidence was exculpatory, then it shall be presented to the Court for in camera inspection. See order entered 23 May 1985, Petitioner's Exhibit 6. It was to be a continuing order. The Court asked the Commonwealth to file its theory of the

case confidentially with the Court to be used by it in inspecting any statements in camera.

On May 16, 1985 trial was set to commence on August 13, 1985.

The Commonwealth filed a written discovery response on May 23, 1985 which produced statements of the Petitioner, but not anyone else (Petitioner's Exhibit 7), and an "Answer to Motion for Exculpatory Evidence" which stated:

> "None known to the Commonwealth at this time."
>
> "Pursuant to Court order all witness statements will be presented to the Court for in camera inspection." (Petitioner's Exhibit 8).

The Petitioner had hired his own private investigators to help him in his defense. The defense acquired information that two individuals has provided the Commonwealth with the reports of

suspicious incidents close in time and place to the murder. As a result, a further discovery motion was filed on August 2, 1985 (Petitioner's Exhibit 9).

A hearing was held before Judge Penn on August 5, 1985. He considered it to be an in camera pre-trial conference and excluded the public. Before the hearing Judge Penn had received from the Commonwealth its theory of the case as well as certain data of the knowledge of witnesses that could arguably be exculpatory. When Mr. Howard raised the issue of the defense's desire to have the Commonwealth produce "any reports regarding suspicious activity of vehicles and persons" (Transcript page 24, Petitioner's Exhibit 10), Judge Penn immediately went into reviewing approximately ten written reports of

statements of persons previously supplied by the Commonwealth for in camera inspection. The Court ruled all the reports to be exculpatory and gave them to the defense. At least one of the statements concerned suspicious events that occurred approximately two weeks prior to the murder (the "Gefaell Statement" - see page 2 of Petitioner's Exhibit 12).

Defense counsel brought up other information that had come to their attention about suspicious activity and its being reported to the Sheriff's Department. Judge Penn suggested that the defense ask for a subpoena duces tecum directed to the Sheriff's Department. The defense followed his suggestion.

On August 8, 1985 a hearing was held before Judge Penn on the petitioner's

request for a subpoena duces tecum to the Sheriff's Department for reports of suspicious vehicles and persons from March 15, 1985 to April 20, 1985. At the hearing Judge Penn ordered the production of all memoranda concerning statements made by Tracy Dillon and Elaine Monroe for in camera inspection and that the subpoena duces tecum be issued in usual form returnable the first day of trial, August 13, 1985.

Evans-Smith's first trial commenced August 13, 1985. On August 30, 1985 the jury found him guilty of second degree murder and fixed his punishment at five years in the penitentiary. He was sentenced, but his conviction was reversed by the Court of Appeals on October 20, 1987. Evans-Smith vs. Commonwealth, 5 Va. App. 188 (1987).

The Commonwealth decided to retry Evans-Smith. On January 11, 1988 the Petitioner filed a discovery motion which included a request for exculpatory evidence under Brady. (Petitioner's Exhibit 14). On January 21, 1988 the Commonwealth filed a written response stating:

> "The Commonwealth is unaware of any evidence subject to the rules of discovery which was not provided or made known to the defense either prior to during the first trial of this case."

(Petitioner's Exhibit 15).

The Commonwealth filed two supplemental discovery responses (Petitioner's Exhibits 16 and 17) but each concerned only statements of the Petitioner.

This Court granted a suppression motion filed by the Petitioner. The Commonwealth appealed, and the Court of

Appeals reversed. After the delay caused by this appeal, the second trial started on April 17, 1989. The jury returned its verdict on April 27, 1989.

At no time did the Commonwealth reveal to the Petitioner or any of his attorneys the existence of Spalding's statements to Merchant on April 16, 1985. At no time did the Commonwealth produce any memorandum or notes of her statements to the Court for in camera inspection and ruling. Evans-Smith did not learn of Spalding's statements until May 1992.

II. CONCLUSIONS OF LAW

A. After Discovered-Evidence Claim

The petitioner argues that he is entitled to habeas relief because the statements and observations of Karen Spalding constitute after-discovered evidence. Assuming that such could be

construed as after-discovered evidence under the four-part test recently reiterated in Carter v. Commonwealth, 10 Va. App. 507, 512 (1990), after-discovered evidence does not constitute a basis for habeas relief. Fitzgerald vs. Bass, 6 Va. App. 38, 46 (1988). Very simply, the purpose of a habeas proceeding is not to determine the petitioner's guilt or innocence but to test the legality of his incarceration.

All relief requested by the petitioner in this proceeding on account of or based upon after-discovered evidence is denied.

B. Material Exculpatory Evidence Claim

In Brady vs. Maryland, 83 S.Ct. 1194 (1963) the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an

accused upon request violates due process where the evidence is material to either guilt or punishment. Implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial. United States v. Agurs, 2392, 2397 (1976).

Borrowing upon the standard imposed in cases involving incompetence of defense counsel announced in Strickland vs. Washington, 104 S.Ct. 2052 (1984), the United States Supreme Court in United States vs. Bagley, 105 S.Ct. 3375 (1985) held:

> We find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

> A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

The Bagley approach has been adopted by the Virginia Supreme Court, Correll vs. Commonwealth, 232 Va. 454 (1987), and the Virginia Court of Appeals, Carter vs. Commonwealth, 10 Va. App. 507 (1990).

In order for Evans-Smith to be granted habeas relief this Court must find that (1) the Spalding statements to Merchant constitute exculpatory evidence and (2) the exculpatory evidence is material. For the reasons set forth below, this Court finds:

(1) that the information reported by Spalding to Merchant is clearly exculpatory evidence, but

(2) that under the Bagley approach such evidence is not material.

(1) Exculpatory Nature of the Spalding Report

As early as May 16, 1985 (about three months before the first trial) the Commonwealth's Attorney was well aware that Evans-Smith contended that someone else has committed the murder. The Commonwealth was well aware that the area in which the murder occurred was rural, and, accordingly, it was not an area where one would expect a great amount of vehicular or pedestrian traffic. Hence, any information of an unrecognized or suspicious vehicle or person in the area at a time not too remote from the offense would be exculpatory. Judge Penn recognized this and so ruled when he ordered the "Gefaell Statement" of an event occurring two weeks prior to the murder be produced to the defense.

This Court feels that the evidence of Spalding's statements to Merchant are

clearly exculpatory given all the circumstances of this case. Therefore, any argument that the defense did not ask specifically for notes of Merchant's "road check" is of no consequence.

Any argument that the reports are not exculpatory because Spalding said she saw the unknown person on Thursday or Friday before the Monday morning murder and not that morning is not accepted by this Court. A perpetrator could have been observing the farm and its occupants in preparation of committing an offense such as a burglary. He could have been prevented from committing an offense the day he was seen by Spalding only to return Monday morning to commit the murder.

Both the Commonwealth and the defense knew that the evidence against the Petitioner was entirely circumstantial.

In such a case the existence of evidence that tends in any way to show that the defendant is not guilty is exculpatory. Evidence that an unknown male was present near the farm even three or four days before the murder must be deemed exculpatory.

The examination of Merchant's notes by the Questioned Document Branch of the United States Secret Service (Respondent's Exhibit 5) found "no indication to suggest the questioned entry (notes of the telephone conversation with Spalding on April 16, 1985) was falsely dated." As an agent of the Commonwealth, Merchant had written notes of exculpatory information on April 16, 1985. The Commonwealth was certainly aware of the "road check" of Merchant because five witnesses (James Anderberg, Ralph Clark, Mark Simms, Bill

Packard and Bart Johnston) testified for the Commonwealth as to the absence of suspicious vehicles Route 725. All five of these witnesses were stopped by Merchant during the "road check" on April 16, 1985. The Court is aware of this from having examined in camera copies of Merchant's notes tendered to the Court by Mr. McLees at the hearing herein on September 23, 1992. These copies were sealed by the order entered herein on September 23, 1992. The Court sees no need in light of the evidence presented on January 12, 1993 for these copies to remain sealed; and, accordingly, orders them to be unsealed and filed herein.

Merchant is an experienced investigator. At the time of this investigation he had been with the Loudoun County Sheriff's Department since February

1984 having retired after twenty years service with the Fairfax County Police Department. A police officer with that much experience in criminal investigations should reasonably be expected to have a basic knowledge of the principles of Brady and exculpatory evidence. It goes without saying that, of course, the Commonwealth's Attorney was aware of Brady and its requirements. No explanation was offered as to why Spalding's statements as reported to Merchant one day after the murder were not produced to defense counsel other than the argument, which this Court rejects for reasons set forth above, that the statements are not exculpatory.

This Court cannot turn its back without comment on the response of Merchant when the petition herein was

filed and it came to light that Evans-Smith had learned of Spalding's statements. Despite the fact that Merchant made notes on April 16, 1985 of both the road stop and the telephone conversation (the notes being no more than five pages apart in a relatively small notebook), in his affidavit dated June 1, 1992, Merchant states that he had "no notes or memoranda" of the telephone conversation. Spalding's affidavit filed with the petition says she talked on the phone with Merchant "a day or two" after she was stopped by Merchant. Merchant acknowledges in his affidavit of June 1, 1992 that he read Spalding's affidavit. The notes of the telephone conversation come right after the notes of the last stop on April 16, 1985. Also, in his affidavit Merchant states that his notes

from the road check were given to defense counsel before trial pursuant to a discovery order of this Court. There was absolutely no evidence presented that the notes were given to defense counsel or why Merchant would have made such a statement under oath.

In his second affidavit dated September 21, 1992, and filed with the Answer to the Amended Petition, Merchant states that after reviewing his notebook he found the notes about the telephone conversation. No questions were ever asked of Merchant at the hearing as to why he did not discover the notes of the telephone conversation (located directly after the road check notes) until after making the first affidavit. Merchant stated he made notes in his notebook chronologically. He did not state he made

notes in any other place. If he knew Spalding contended she talked to him a day or two after the stop, it seems to this Court that Merchant would have known exactly where to look without any difficulty for any notes of the telephone conversation. The notes are exactly where one would expect them to be considering when Spalding said in her affidavit that she called Merchant and the method he used to take his investigative notes.

Although it is not relevant or material to this proceeding why the statements were not produced, this Court cannot just merely look away from the circumstances of the nondisclosure when it considers the importance of the Evans-Smith prosecution, the severity of the offense, the defense's theory at trial, the continuing protestation of innocence

by Evans-Smith, the rulings of Judge Penn before the first trial as to other information he deemed exculpatory and the involvement of an experienced prosecutor and investigator. In its first written discovery response the Commonwealth even stated that it would present all witness statements to the Court for in camera inspection, but obviously it did not do so. Considering the pre-trial circumstances of this case, it is very difficult to understand the failure to produce Spalding's statements to the defense.

Spalding's statements in light of all the circumstances of this case are exculpatory.

(2) Materiality of the Spalding Reports

The materiality issue must be addressed from two aspects. First, this

Court must consider what defense counsel could have done or would have done differently if the Spalding statements had been revealed to them. Second, this Court has to consider what the effect would have been on the result of the trial if Spalding's evidence had been presented to the jury.

Mr. Moyes testified at the hearing that if defense counsel had known of Spalding's statements to Merchant, then they would have investigated everyone in the neighborhood and looked for a match to the unknown hairs found at the crime scene. The defense would have conducted further investigation of people near the murder scene and would have pursued further forensic tests. However, the Petitioner gave no specifics of exactly what additional investigation of the

neighborhood his private investigators would have pursued. Mr. Moyes testified that Evans-Smith spent close to $100,000.00 on private investigators, but there was no evidence of exactly what they did in their investigation of people in the neighborhood. There was no evidence of what the investigators did not pursue but would have pursued if they had been aware of Spalding's statements to Merchant.

Spalding lived close to the Evans-Smith farm at the time of the murder yet there was no evidence that the defense had interviewed her or any member of her family before trial. If the defense's theory was someone else perpetrated the crime, then it seems logical to at least ask the occupants of all the nearby homes if they had seen or heard anything. Also,

the defense's investigators could have conducted a "road check" similar to the one that Merchant performed.

The defense was well aware (from Evans-Smith's own observations) of suspicious activity on Route 725 at or about the time of the murder. This should have been enough to cause the defense to investigate the presence of suspicious vehicles or persons at that time. The Petitioner has not particularized anything unusual or peculiar to Spalding's statements that would have caused the defense to investigate in a different manner.

Granted that if the defense had known of Spalding's statements, then she could have been interviewed close in time to her observations which would likely result in a clearer recollection and the development

of more details. To say that she might have then provided information that could have led to the identity of the person that she saw is sheer speculation. It is common sense that the observations that would have led to a specific identification of the person are the observations that she would most likely continue to recall to this day. Her recollections as presented at the hearing do not provide anything that would tend to identify the person she saw that morning.

The Petitioner argues that if he had been aware that Spalding had seen a person as she said, then his defense could have been pursued additional forensic testing. He did not particularize or specify what testing. Perhaps tests could be done to the hairs found at the scene if the person Spalding saw was found. But it is sheer

speculation that the person could have been found. All forensic tests were available to the defense as to any item found at the crime scene. The Petitioner has failed to show what would have been done differently as to forensic testing if the defense had been aware of Spalding's statements.

This Court would have to speculate as to what other things the defense could have done and what the results would have been if the defense had been advised before trial of Spalding's report. The Petitioner has presented nothing to show that it would have been even probable that having knowledge of Spalding's statements the person could have been located by the defense. Even if the person were located, one would have to again speculate that the person would have provided exculpatory

evidence. The presence of the person on a public road where he had a right to be does not automatically in and of itself implicate him in a nearby murder.

It is certainly reasonable to assume that if the defense had known of Spalding and her report to Merchant, then the defense would have called her as a witness. If she had testified to seeing a person on Route 725, even if on the morning of the Thursday or Friday before the Monday murder, then it would have been admissible at trial. However, this Court cannot find exactly what her testimony would have been or what it would be if she had testified at a prior trial or would testify at another trial if held. For example, she told Merchant in the telephone conversation of April 16, 1985, that the person had a reddish-brown beard

and she stated in her affidavit filed with the petition that the person had blond hair but no beard, but at the hearing she testified that the person had blondish-brown hair and did not mention a beard. Also, in her affidavit she stated that she called Merchant within a day or two of the stop, but at the hearing she testified definitely that she called Merchant the day of the stop. Further, at the hearing she testified to other information about the person which she did not relate to Merchant on April 16, 1985, e.g., the person had his head down and a baseball cap pulled down over his eyes. On September 17, 1992 Spalding gave a statement to the State Police that she had seen the person the "day before, two days before" she was stopped and the person had blond hair. The Court cannot overlook

that Spalding was working for the law firm of one of Evans-Smith's trial attorneys at the time her statements came to light in May 1992.

Even if Spalding testified at trial that the man she saw had blond hair or brownish-blond hair, the Commonwealth could have impeached her by Merchant's testimony of her prior inconsistent statements to him that the man had a reddish-brown beard.

Even though the case against Evans-Smith was entirely circumstantial, there was sufficient circumstantial evidence presented at trial to convict him. There is no need to review that evidence here as this Court reviewed it in detail in its opinion letter of July 21, 1989 when the motion to set aside the verdict for insufficient evidence was denied. This

ruling has been reviewed by the Court of Appeals and the Supreme Court of Virginia, and neither court reversed that decision.

The jury heard evidence of at least two other suspicious incidents and/or persons near in place and time to the murder but found the Petitioner guilty. This Court is of the opinion that even if the jury had received evidence of a suspicious unknown person with blond hair on Route 725 near the Evans-Smith farm on the morning of the murder, the result would have been the same despite the evidence of one blond hair of unknown origin (not forcibly removed, but fallen out) found on the stairway leading to the bedroom where Barbara was found and one hair of unknown origin found near her hand. There was no evidence of a forced entry. There was no evidence of any

outside dirt, mud or moisture being tracked inside the house. The Commonwealth's forensic scientist, Deanna Dabbs, testified at length at the trial about how unknown miscellaneous hairs can be present at a crime scene. This Court is of the opinion that even if the jury had heard Spalding's testimony, there is no reasonable probability that the outcome would have been different.

For the foregoing reasons, this Court finds that even though Spalding's statements to Merchant are exculpatory, the statements are not material because there is no reasonable probability that, had the evidence been disclosed to the defense, the result would have been different. Accordingly, the Petitioner is denied any habeas relief on the ground of

the failure to disclose exculpatory evidence.

C. Claim of Loss of Potentially Useful Evidence Because of Bad Faith of the Police

The Petitioner asserts in his Amended Petition that the statements of Spalding to Merchant should be considered as evidence potentially useful to the defense which was lost due to the bad faith of the police in violation of his due process rights citing Arizona vs. Youngblood, 109 S.Ct. 333 (1988). The Petitioner sets forth in fifteen paragraphs over two and one-half pages allegations of various actions by the Sheriff of Loudoun County and two Sheriff's Department investigators, Merchant and Jeff Brown, Which "reveal a pattern of bad faith" on the part of the police.

This Court is of the opinion that Youngblood only applies to evidentiary material in the hands of the prosecution that becomes lost or destroyed before the defense could test it, and the test results might have exonerated the accused. Youngblood does not apply to statements or observations of witnesses of which the prosecution may have knowledge because such statements or observations come under the Brady doctrine. Youngblood deals with evidence that never became available to help the defense. Such is not the case here because the Petitioner eventually became aware of the Spalding statements. Brady concerns exculpatory evidence known to the prosecution whereas Youngblood concerns evidence that if preserved would have been potentially useful to the accused. Youngblood deals with items such

as blood samples, clothing or other items of physical evidence which are no longer available for the defense's experts to analyze and test for the defendant's benefit. Even if Merchant's notes are considered evidentiary material under Youngblood, the notes have not been lost or destroyed, and the Petitioner has not articulated how he was prejudiced by not having Merchant's actual notes as opposed to merely not having the information related to Merchant by Spalding.

Youngblood is not applicable to the facts as alleged by the Petitioner or as presented at the hearing. The allegations of bad faith, therefore, even if true, are immaterial and not relevant to this proceeding. Any relief on the basis of an alleged Youngblood violation is denied to the Petitioner.

Evans-Smith may not have liked how he was treated by the police officers, but nothing has been alleged to show that his rights were violated. He is entitled to a fair trial, not a perfect trial. This Court is of the opinion that he received a fair trial in April 1989. Insensitivity, discourtesy and overzealousness of police officers may be distasteful to Evans-Smith (and they are to this Court, but surely to a lesser extent), but the incidents alleged do not arise to a constitutional deprivation.

Conclusion

For the reasons stated herein, the Amended Petition for Writ of Habeas Corpus is denied, and it is dismissed. Let Mr. McLees, Assistant Attorney General, prepare an order consistent with these Findings of Fact and Conclusions of Law.

Copies hereof have been mailed this day to counsel of record. Petitioner is advised of his right to appeal this decision.

1 February 1993 /s/ James H. Chamblin
Date James H. Chamblin, Judge

VIRGINIA: IN THE CIRCUIT COURT OF LOUDOUN COUNTY

WILLIAM EVANS-SMITH	)	
	)	
Petitioner	)	AT LAW NO. 13577
	)	(Petition for Writ
vs.	)	of Habeas Corpus)
	)	
JOHN B. TAYLOR, WARDEN	)	
	)	
	)	
Respondent	)	

O R D E R

After consideration of the Memorandum filed by the Respondent [SIC., Memorandum was filed by the Petitioner] and the argument of counsel on June 10, 1993, the Court is of the opinion that it did not err in its decision as set forth in the Ruling dated February 1, 1993 and the order entered May 25, 1993, and, further, for the reasons stated in oral argument on June 10, 1993, by Assistant Attorney General John H. McLees, Jr., it is

ADJUDGED and ORDERED that the Respondent's [SIC., Petitioner's] Motion for Reconsideration is denied.

This order was prepared by the Court. Endorsements are dispensed with under Rule 1:13.

Let the Clerk mail a certified copy hereof to all counsel of record.

ENTERED this 14th day of June, 1993.

/s/James H. Chamblin
JAMES H. CHAMBLIN, JUDGE

EXCERPT FROM THE CODE OF VIRGINIA:
HABEAS CORPUS

Section 8.01-654. When and by whom writ granted; what to contain - A. The writ of habeas corpus ad subjiciendum shall be granted forthwith by any circuit court, to any person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority.

B.1. With respect to any such petition filed by a petitioner held under criminal process, and subject to the provisions of Sec. 17-97, only the circuit court which entered the original judgement order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus. If a district court entered the original judgment order of conviction or convictions complained of in the petition

only the circuit court for the city or county wherein the district court sits shall have authority to issue writs of habeas corpus. Hearings on such petition, where granted in the circuit court, may be held at any circuit court within the same circuit as the circuit court in which the petition was filed, as designated by the judge thereof.

2. Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.

3. Such petition may allege detention without lawful authority through

challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by petitioner.

4. In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record.

5. The court shall give findings of fact and conclusions of law following a determination on the record or after hearing, to be made a part of the record and transcribed.

6. If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be deemed to waive his privilege with respect to

communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground. (Code 1950, Section 8-596; 1958, c. 215; 1968, c.487; 1977, c. 617; 1978, c.124.)

EXCERPTS FROM CODE OF VIRGINIA SECTIONS, CONCERNING SECOND DEGREE MURDER AND PUNISHMENT FOR A CLASS 3 FELONY 18.2-32 and 18.2-10, as amended.

Section 18.2-32. - First degree murder defined; punishment. -- Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary or abduction, except as provided in Va. Code section 18.2-31, is murder of the first degree, punishable as a Class 2 felony.

All murder other than capital murder and murder in the first degree is murder of the second degree and is punishable as a Class 3 felony. (Citations omitted).

Section 18.1-10. Punishment for conviction of felony. - The authorized punishments for conviction of a felony are:

....(c) For Class 3 felonies, a term of imprisonment of not less than five years nor more than twenty years and, subject to subdivision (g), a fine of not more than $100,000.

.... (Citations omitted).

EXCERPT FROM THE CONSTITUTION OF THE UNITED STATES

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offenses to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken from public use, without just compensation.

EXCERPT FROM THE CONSTITUTION OF THE UNITED STATES

AMENDMENT [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

EXCERPTS FROM AFFIDAVIT OF KAREN SPALDING

My husband, daughter, and I lived on Route 725 in the Lincoln/Hamilton area of Loudoun County, Virginia during the period of January, 1985, through May, 1985. At that time, I would drive my daughter, Amy, to Lincoln Elementary each morning between the hours of 7:30 and 8:00 a.m. We were living at this location on Route 725 due to a fire in our marital home. During this period, I worked for Finalco, Inc. in McLean, Virginia. My position with Finalco was administrative assistant in the marketing department.

In April of 1985, one morning I was driving down Route 725, taking Amy to school and I was stopped by a man standing in the middle of the road. I noticed a car (unmarked parked along my driver's side of the road (left)). The man

identified himself with a card, saying his name was Jay Merchant, and he asked me where I was going and did I drive on this road at the same time each day. I answered him with - yes, I take my daughter to school every morning at the same time each day. He then asked me if I drove down Route 725 yesterday morning? I said yes, that I drive down this road every morning. He told me to call him if I could think of anything to tell him and told me to call the number on the card. I asked him why he was asking all of these questions? He answered that a woman had been killed. At that point in time, he excused me and I drove my daughter to school.

While driving myself to work, I started thinking about what had happened and remembered seeing a man walking down

the road the morning before. It is strange to see someone walking down that road, it is an isolated area and it is rare to see people walking along that road because the houses are so far apart - there are no convenience stores or anything. I couldn't imagine why he was walking on that road. I called Jay Merchant within a day or two to tell him about the man that I saw on Route 725.

The man I saw was wearing a jean jacket and jeans. He was medium height, blond hair, early thirties, no grey hair, no beard, medium build, no unusual features in the face or body and he was not carrying anything.

The man I saw was walking towards the bridge on Route 725, near the Evans-Smith driveway, with his head down looking at the ground. When I passed him, and looked

in my side-view mirror, he never looked up at my truck as I passed him.

When I spoke with Jay Merchant, I remember telling him what the man was wearing, that he had blond hair, what day I saw him and where the man was located on the road. I can't recall what Mr. Merchant said in response to this. I never heard from Jay Merchant or anyone after my conversation with him.

I have never met William Evans-Smith or any of his family members. I started working for Moyes & Anderson in November of 1991. I began my training in the Falls Church office, and then came to Leesburg to work for Bob Anderson. I did not meet David Moyes until 1987 when we moved to Lovettsville. I never discussed this case with Mr. Moyes, nor did I even know that he represented Mr. Evans-Smith until after

the first trial took place and I read it in the newspaper.

I thought it was strange that no one ever called me back or anything. When the paper came out (Loudoun Times), it showed a picture of Mr. Evans-Smith at the time of his arrest. It was not until I read in the paper about Mr. Evans-Smith's arrest that I realized why they never called me back to ask me anymore questions. I never thought about it anymore.

I swear and affirm that this statement is true to the best of my knowledge.

/s/ Karen Spalding
KAREN SPALDING

EXCERPTS FROM AFFIDAVIT OF JAY MERCHANT

1. I am a Deputy Sheriff with the Loudoun County Sheriff's Department. As such, I was involved in the investigation of the murder of Barbara Evans-Smith in Loudoun County in 1985.

2. As part of the investigation, I conducted a " road check" by stopping cars which drove along Route 725 past the Evans-Smith property from approximately 4:00 a.m. until 8:30 a.m. on April 16, 1985, the morning after the murder. I have read the affidavit of Karen Spalding filed with Mr. Evans-Smith's habeas corpus petition in the Circuit Court of Loudoun County, stating that I stopped her that morning and describing my conversation with her. I presently have no recollection of stopping Mrs. Spalding, but my notes taken during the road check

indicate that I did so. I made a note of each motorist whom I stopped that morning, and, if they indicated they had driven that road on April 15th, the morning of the murder, I made a note of the time they passed the Evans-Smith property. If the motorist remembered having seen anything significant on the road the previous morning, I made a note of that also. My notes of my conversation with Mrs. Spalding indicate that she told me she had passed the Evans-Smith property at approximately 8:00 a.m. the previous morning, as she did each day. Because I made no other notation, I am confident that she told me nothing else of significance to the case at that time.

3. Photostatic copies of my notes from the road check, including my note of my conversation with Mrs. Spalding and her

full name, address, and telephone number, were given to Evans-Smith's defense counsel before trial pursuant to a discovery order of this Court.

4. I have no present recollection of a subsequent telephone call from Mrs. Spalding, and no notes or memoranda of such a telephone conversation, and I thus cannot affirm or deny that she subsequently called me as indicated in her affidavit. However, if she did call me and related to me, as stated in her affidavit, that she had seen a blonde man walking on Route 725 near the Evans-Smith property when she passed that location at approximately 8:00 a.m. on April 15th, I would not have regarded that information as significant to our investigation, made any notation of it, committed it to memory, or relayed it to others involved

in the investigation. This is because the Loudoun County Sheriff's Department at that time had information that the murder had occurred at approximately 6:00 a.m., and the murderer would not have lingered at the Evans-Smith property for two hours thereafter.

5. On the morning of April 16th, when I conducted the road check, I already knew that the county coroner, based this examination of the body and all other information available to him, had estimated the time of death at approximately 6:00 a.m.[1] On April 15th, I had interviewed Mr. Evans-Smith, and he told me that his wife had eaten a

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[1]At the criminal trial, Dr. Hocker testified that the time of death was estimated at 6:00 a.m. give or take two hours either side. Therefore, his estimation of the time of death was between 4:00 a.m. and 8:00 a.m.

breakfast of peaches and toast at approximately 5:45 to 6:00 a.m. On April 17th the day after the road check, we learned that the autopsy revealed that the victim had died within 30 to 60 minutes after eating such a meal.[2]

6. The sighting ostensibly reported by Mrs. Spalding would thus occurred at least an hour after the murder, and I would not have noted it as significant to the investigation.

/s/ Jay Merchant
Jay Merchant

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[2]The autopsy was conducted by Dr. Byer, who testified at the criminal trial, that time of death occurred 30 to 60 minutes after her last eating, not "within" 30 minutes of her eating.

EXCERPTS FROM THE AMENDED PETITION FOR WRIT OF HABEAS CORPUS

D. Present Petition

14. State the grounds which make your detention unlawful, including facts on which you intend to rely:

ANSWER: a. The prosecution withheld from the Petitioner the statement of Karen Spalding made to Loudoun County Sheriff Investigator Jay Merchant, that while driving her daughter to Lincoln Elementary School, along Route 725 between the hour of 7:30 to 8:00 a.m. the day of Barbara Evans-Smith's murder in 1985, she had seen a suspicious man with blond hair walking on Route 725 near the Evans-Smith farm gate. This statement, which was first learned by Petitioner's counsel, Ann B. Vance, Esq., on or about May 6, 1992, is material exculpatory evidence which was known or which knowledge is attributable

to the Commonwealth because of their connection with the investigation of the case, but not disclosed to the Petitioner pursuant to his discovery request in violation of his right to due process under the Fourteenth Amendment to the Constitution of the United States. Affidavit of Karen Spalding attached hereto as Exhibit "A".

b. This statement of Karen Spalding is newly discovered, material exculpatory evidence [an unidentified blond hair was found on the 8th step of the stairs in the Evans-Smith home leading to the victim's bedroom] which, by the exercise of due diligence, could not have been discovered by the Petitioner before either trial. This statement was taken by Investigator Jay Merchant during the sheriff department investigation of the case, during a road

survey of drivers along Route 725, which survey occurred shortly after the murder of Barbara Evans-Smith. Under the Fourteenth Amendment to the U.S. Constitution, the Petitioner is entitled to present this new evidence at trial.

c. In the event that the statement/observations of Karen Spalding which (information Investigator Merchant asserts he does not remember taking and avers that if he did, he did not retain it because it would not have been "significant to our investigation") are found to be not material exculpatory evidence but only "potentially useful evidence" under Arizona v. Youngblood, 488 U.S. 51 (1988), the Petitioner asserts that his Fourteenth Amendment rights to due process were violated in that this information was lost due to bad faith on

the part of the police, including but not limited to the following actions, which reveal a pattern of bad faith:

1. The police found Petitioner's deceased wife at approximately 11:30 a.m. April 15, 1985, and failed to notify him of her death until approximately 3:45 p.m. that afternoon.

2. The police did a road check in front of the Evans-Smith's entrance gate the morning of April 16, 1992, between 4:00 a.m. and 8:30 a.m., and Investigator did not maintain notes on the details of interviews which revealed information about the road after 6:00 a.m., e.g. Mrs. Spalding's telephone statement.

3. The police failed to produce to the Defense pursuant to discovery

requests the statement taken by a sheriff deputy of Evans-Smith's neighbor Patricia Packard shortly after Barbara Evans-Smith's murder indicating someone was seen driving out of the Evans-Smith driveway between 9:00 a.m. and 11:00 a.m. the morning of the murder, which evidence was developed by Defense investigators.

4. The police failed to timely investigate the incident report of Tracy Dillon, who encountered a strange dingy colored van, similar in description to the one identified by the Petitioner, run a stop sign, coming from the direction of the Evans-Smith farm at approximately 8:30 a.m. the morning of Barbara Evans-Smith's murder, which evidence was developed by Defense investigators.

5. The police failed to identify horse boarders at the farm

adjacent to the Evans-Smith's property (known as Grassymeade), which evidence was developed by Defense investigators, and which evidence revealed that said boarders were at the adjacent property the morning of Barbara Evans-Smith's murder at 6:30 a.m.

6. Investigator Merchant and Chief Investigator Jeff Brown conducted a three hour custodial interrogation of the Petitioner on April 17, 1985, which became the subject of a suppression hearing, which motion was granted by this Court. (Transcript of April 6, 1988, pp 1-138). During said interview, there were numerous incidents which Petitioner asserts reflect bad faith. Moreover, Petitioner asserts that it was during this interrogation that Investigator Brown responded to his inquiries about the van and suspects in

his wife's murder, which response was that the sheriff's department did not have the money to run all over Loudoun County looking for such a van or ask each person in the County if they had murdered his wife.

7. Petitioner was arrested by Sheriff Investigators Merchant and Brown five days after the April 17 interrogation. While Petitioner was riding his tractor, the Investigators approached with guns drawn, and without provocation or resistance of any kind on Petitioner's part, dragged him off his tractor, arresting him for the murder of his wife. Petitioner requested that before they left his residence, they at least close the doors. While Investigator Merchant shut up the Petitioner's house, Investigator Brown turned to him in the

police car and spit out "You murdered your wife, you son of a bitch."

8. Sheriff John Isom appeared on public television within two weeks of the murder of Barbara Evans-Smith (and prior to the forensic evaluations which revealed the presence of others on the crime scene) announced that "William Evans-Smith murdered his wife".

9. Investigators Merchant and Brown conducted intensive, threatening interrogations of Petitioner's co-workers shortly after the murder, during which interrogations unfounded characterizations were made of the Petitioner, e.g. interviews of co-worker Margaret Child Quinn.

10. Shortly before the first trial in August of 1985, Defense counsel released to the Commonwealth information

concerning inconsistent statements given to Defense investigators from two of the horse boarders on the adjacent farm known as Grassymeade, Robert Rivera and Rudi Ruiz, and the fact that neither Rivera nor Ruiz were seen, as they had alleged, bringing a horse through security at Charlestown Race Track. At a break in the first trial, Chief Investigator Jeff Brown was observed by Defense investigators interrogating officials at the Charlestown Race Track and asserting that contrary to track policy it was common practice for horses to be brought onto the track without registering with security. Police were also advised by Defense that Rudi Ruiz had been interviewed in Caney, Oklahoma, by Lt. John Williams (a Garland, Texas police officer, retained by Defense investigators to locate Ruiz), during

which interview Ruiz gave a materially conflicting statement from his prior statement (and eventual court testimony) and from Rivera's statement. When subpoenaed by the Defense, Lt. John Williams, after a call to his supervisor by Chief Investigator Jeff Brown, advised Defense investigators that his supervisor had withdrawn his authorization to come to Virginia to testify regarding the Ruiz interview. Attached as Exhibit "B" please find the affidavit of Robert M. Puglisi. Moreover, it was reported to the Defense that Ruiz and Rivera were housed by the Commonwealth at the same Hotel, which would have allowed them to discuss their testimony prior to trial. Rivera's statements to the Defense investigators and in court were not consistent in major aspects.

11. At trial both Investigators Brown and Merchant testified they had asked Evans-Smith during the April 17 custodial interrogation whether or not he had ever had an extra-marital affair; however, Investigator Merchant's notes indicated they had actually asked if either he or his wife had an affair.

12. At trial both Investigators Brown and Merchant testified the Petitioner had given conflicting statements where the Petitioner had said the van was located, whether on the right or left side of the road; however, Petitioner's witness John Thompson testified that it was the investigators who became confused.

13. At a hearing following sentencing resulting from the first trial, Petitioner and trial counsel, David H.

Moyes, Esquire, found a letter sealed in the Court's file, and upon questioning to Judge Carleton Penn, the envelope was unsealed by the Judge, and revealed a letter addressed to the Chiefs of Police of Purcellville and Leesburg which reported that there had been a raucous party at the Dodge farm (which shared a one quarter mile common property line with the Evans-Smith property) the week-end of Mrs. Evans-Smith's murder, which letter had not been released to the Defense prior to the end of the trial. In fact the Petitioner had told investigators that Sunday evening (April 14, 1985) while on his tractor, he had seen a couple of young men sauntering along Route 727 (coming from the direction of the main gate of the Dodge farm).

14. Contrary to this Court's prior instructions to counsel, in testimony Sheriff John Isom mentioned his involvement in the first trial, which in defense thereof he stated that the Commonwealth Attorney had failed to instruct him on this restriction and which action resulted in the Defense's motion for a mistrial (Transcript of April 19, 1989, pp 860-868). However, Sheriff Isom, having come out of the courtroom, was reported to have approached two potential witnesses and was overheard by Shirley Naughten, fiance of defense counsel Moyes, saying "Well, this is what we want them to think, this is the way we're going to go about this." (Transcript of April 21, 1989, pp. 1287-1321). It was after this April 21, 1989, hearing when the Petitioner and Sheriff Isom passed one

another in the hallway and Sheriff Isom addressed the Petitioner as "you murderer."

15. Chief Investigator Brown failed to follow the Court's instruction against discussing the case or the testimony with witnesses, which actions resulted in the investigative hearing conducted by the court regarding his contacts with at least three key witnesses during trial (Transcript of April 25, 1989, pp. 2071-2092). Investigator Brown also asserted that the Commonwealth Attorney had failed to instruct him on this restriction. Chief Investigator Brown further stated upon cross-examination at the second trial that "...I've worked, as you know, a lot of criminal cases. But there's never been a case that I've worked that's any nearer and dearer to my heart that the Evans-

Smith murder case." "For that reason, many of the facts that I've testified to here today, I'll take to my grave with me."

EXCERPTS FROM THE PROCEEDING BEFORE THE CIRCUIT COURT OF LOUDOUN COUNT, 1-12-93 TESTIMONY OF KAREN AND BOB SPALDING (Transcript pages 25-46):

KAREN LYNNE SPALDING,

a witness, called for examination by counsel for the Petitioner, and, after having been duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION ON
BEHALF OF THE PETITIONER

BY MS. VANCE:

Q. Would you please state your full name for the Court.

A. Karen Lynn Spalding.

Q. Where do you presently live?

A. Lovettsville.

Q. Where were you living in April of 1985?

A. In Lincoln, Virginia.

Q. Why were you living in Lincoln, Virginia at that time?

A. On January 4th of 1985, we had a fire in our house in Purcellville, and we were out of our house for approximately six months because of that.

Q. At that time was your daughter in school in Lincoln?

A. She still went to school in Lincoln, at Lincoln Elementary. Even though we lived in Purcellville, she was allowed to remain in that school.

Q. Did there come a time in April of '85 that you were stopped by an investigator and questioned regarding what you may have seen on Route 725?

A. Yes.

Q. Would you please tell the Court when he stopped you, who was it?

A. It was in the morning, between about 7:30 and quarter of 8:00, because I had to have my daughter to school by 8:00. The

officer identified himself as Jay Merchant, an investigator, or detective, or something. Gave me a card. Asked me my name, where I lived, where I was going. Asked me how often I traveled the road, did I come at the same time every day, and I said yes. I answered all of his questions. He was writing something. And I guess it was at the close he gave me a card of some kind. He told me to call him if I heard of anything or knew anything. I said to him why, what is going on, why do you need this information; and he said that someone had been murdered, and he pointed to the driveway.

Q. At that time where were you working?

A. At Finalco. Incorporated. It's an equipment leasing company in McLean.

Q. What time did you have to be at work?

A. Nine.

Q. So that you would normally leave early enough to drop your daughter off?

A. Uh-huh.

Q. If you would please come down here and show to the Court, let me locate you on this aerial photograph with what has been identified as Route 725, and if you would point to the Court where it is that you were living at the time, if it's on this map.

A. It would have been here (indicating).

Q. And that was the property that you lived on for approximately six months?

A. Uh-huh. The name of it was Foxmeade.

Q. And your normal route down 725 -- if you could stand this way, and then, yes.

THE COURT: Mrs. Spalding, could you kind of move just a little bit more. After all, I think I'm the one that really needs to see this more than anybody else.

Thank you.

A. Came out the road, followed on down. There's another turnoff here, which is 784. It comes on around here, and as you get closer, there's a little bridge down here. It's not very good along here, the bridge, but it's just past Mr. Evans-Smith's driveway.

Q. And your direction would take you down Route 725?

A. Uh-huh. On up into Lincoln.

Q. And on this particular map can you see the bridge better, this road here, 725?

A. Yes. The bridge is here.

Q. And the gate is approximately down there?

A. Uh-huh. The road gets very narrow along there, because it's a one-lane bridge.

Q. Did you later contact Investigator Merchant?

A. Uh-huh.

Q. Did you later call him?

A. Yes.

Q. What did you advise him?

A. That I saw someone on the road the day before.

Q. Where on the road did you see that particular person? Perhaps if it would be easier to step to the side and point with a pen.

THE COURT: Well, actually, the bailiff has brought out a pointer there. It might be very helpful. Why don't you use that, Mrs. Spalding.

Thank you.

Q. Locating right here.

A. It was prior to the gate, along these trees, because I remember the trees,

because that's where the road begins to get narrow and very rough, someone was walking. There's no shoulder, so they were walking in the road.

Q. Would you please describe the individual?

A. I remember jeans, a jean jacket, white T-shirt, and blondish-brown hair.

Q. How would you describe his behavior, his demeanor?

A. He was just walking. He wasn't carrying anything. He didn't like flag anybody down, or attempt to stop me as if he was in trouble. He was just walking. I believe he had his head down, just walking like this (indicating).

Q. What has been your experience, or had been your experience along that route since you were driving it with seeing

pedestrians, people walking along the road?

A. No one. You never saw anyone on that road. It was unlikely to even pass another car.

Q. Why would that have been the case?

A. It was rural, very rural. There were very few places out there. Most of them set way back off the road. I mean, we were there for six months and you never saw anyone, other than that day, that person. We didn't know anybody other than we did have occasion to meet Dr. Joe Rogers, whose property surrounded us.

Q. Do you recall what time of day you may have heard from Mr. Merchant, or called Mr. Merchant?

A. I believe I called him when I got to work.

Q. Was he in?

A. No. I left a message.

Q. Did he return your call?

A. Uh-huh.

Q. What do you recall telling him about what you observed?

A. Just what I said, that I saw someone on the road that day before. And I guess he asked me to describe him, and I did; Jeans, jean jacket, blondish-brown hair. I don't remember him asking anything else. He said someone would get back to me.

Q. Did someone get back to you?

A. No.

Q. Did you discuss with anybody the fact that you had seen somebody by the entrance gate? Did you talk to your husband about it?

A. When I got home I told my husband that I was stopped and what had happened. I told him that I had called the Sheriff's

Office because I remember seeing somebody that day.

Q. When were you hired by David Moyes?

A. November of last year.

Q. Do you actually work for David Moyes, or do you work for his partner?

A. No. I work for Robert Anderson.

Q. At any time prior to May of this year, did you discuss your observations the morning of April 15th with anybody?

A. No.

Q. Did you discuss them with David Moyes?

A. No.

Q. What brought about your coming to my office and telling me about this?

A. Cindy Becker was a client of ours, and I took a phone call one morning from her neighbor that -- the neighbor was calling something about an appointment,

and in the course of the conversation she mentioned that Cindy's house was on fire and that she wouldn't be making her appointment. I went in to tell David, and I came back to my desk, and sat down, and commented whatever happened, it's too bad because I knew how it felt. And I mentioned this to Mrs. Sue Garrison, and she asked me something about, what do you mean. So I told her, I said, well, in '85, we had a fire in our house and we had to leave it. And I said we lived in a house near Mr. Bull Evans-Smith. I said, in fact, we were one farm away. And I remember she was like, what. And I said, well, I was stopped one morning by one of the investigators, and she immediately turned around and called you. I was like what are you doing.

Q. Was this the first conversation you had with anyone in Mr. Moyes' office?

A. To anyone about any of it in all this time.

Q. Do you know Blair Howard?

A. No.

Q. Do you know William Evans-Smith personally?

A. No.

Q. Did you have any other contact with David Moyes prior to being hired in his firm?

A. He reviewed some papers for me in 1990.

Q. When did you start working for the firm?

A. Last year, last November.

Q. 1992 or 1991?

A. It would be '91, I guess.

Q. Where did you initially begin working in that office?

A. Two days in Falls Church. And then they closed that office, and I stayed in Leesburg.

MS. VANCE: Excuse me for a second.

(Ms. Vance and Mr. Fischel conferred.)

MS. VANCE: Nothing further. If you will answer Mr. McLees' questions.

CROSS-EXAMINATION
ON BEHALF OF THE RESPONDENT

BY MR. MCLEES:

Q. Good morning, Mrs. Spalding.

A. Good morning.

Q. Let me just say, we appreciate your cooperation with the Sheriff's Department and the authorities. We regret any inconvenience that all of this has caused you. The fact that I'm cross-examining you, I hope you won't take it as my

putting you on trial, or attacking you. I'm just trying to make sure that we understand all of the facts accurately.

I understand that you had these two conversations with Deputy Merchant, and then you spoke to your husband about it that evening; is that correct?

A. Uh-huh.

Q. And my notes from your direct examination indicate you say you told your husband that you had been stopped and what happened, and that you called the Sheriff's Office because you had seen something. Is that what you recall telling your husband; is that accurate?

A. Yes.

Q. And then do I understand correctly that after telling your husband that night, which would have been, I guess, April 16th, 1985, you never discussed this

with anyone until last spring, when this conversation came up in the law office?

A. That's correct.

Q. Isn't it correct that you don't recall exactly what morning it was you saw this individual walking down the road?

A. Uh-huh.

Q. The day you were stopped by the officer was a Tuesday; was it not?

A. Correct.

Q. So your testimony is that you saw the individual Monday morning?

A. Right; correct.

Q. Couldn't it have been the previous Thursday or Friday?

A. No, because I remember the time being closer together that I saw him.

Q. Well, Mrs. Spalding, on September 17th of last year, you gave an interview to Special Agent Mike O'Conner of the

Virginia State Police, did you not, in your home?

A. U-huh.

Q. At the time weren't you asked what was it that you told Deputy Merchant on the telephone, and did you not respond, I gave him, I told him that I had seen somebody on the road the day before, two days before. I told him it was a man about in his late 20s or early 30s, he had jeans on, a jean jacket. he was just walking down the road towards Lincoln because he was walking in the same direction I was driving, so he was on the passenger's side. I went past him. He didn't stop, he didn't notice, and he wasn't hitchhiking or anything like that. He was just walking with his head down, and I just remember seeing blond hair?

A. U-huh.

Q. So you told him that you had seen somebody on the road the day before, comma, two days before?

A. Two days before would have been the weekend, and I wouldn't have had my daughter with me. It had to have been the day before.

Q. Or the previous Thursday or Friday?

A. I remember it being closer together.

Q. Well, now, you didn't remember, when Deputy Merchant stopped you the morning of the 16th, you didn't remember this individual at all, I guess; did you?

A. At the time he stopped me?

Q. Yes, ma'am.

A. No. I thought about it on my way in.

Q. Were you not also asked in your interview with Special Agent O'Connor and Special Agent Rowland, what I'm trying to get at is, was it the day before the phone

call or the day before he stopped you on the road? And did you not respond, it was before he stopped me on the road I saw the person walking, before Mr. Merchant stopped me that I saw him. Was that your answer to that question?

A. Uh-huh.

Q. And then were you not asked by Special Agent Rowland, it was the day before that. Was it two days before that, three days before that? You don't know? And did you not respond, no sir, I don't know. She was killed on a Monday. Then it would have been a couple of days before, because obviously Saturday and Sunday was a weekend, I didn't go out the road. Was that not your response to that question?

A. Correct.

MR. MCLEES: Nothing further, your Honor.

MS. VANCE: I have nothing further.

THE COURT: Can she be excused, then? She won't be needed any further as a witness , will she?

MS. VANCE: I believe she can be excused.

MR. MCLEES: Yes, sir.

THE COURT: Thank you. That means you can step down. You're free to go, or you can stay in the courtroom, whatever you would like to do.

(The witness was excused.)

THE COURT: Who is next, Ms. Vance?

MS. VANCE: Bob Spalding.

ROBERT CARL SPALDING,

a witness, called for examination by

counsel for the Petitioner, and, after having been duly sworn by the Clerk, was examined and testified as follows:

DIRECT EXAMINATION ON
BEHALF OF THE PETITIONER

BY MS. VANCE:

Q. Would you please state your full name for the Court.

A. Robert Carl Spalding.

Q. Are you married to Karen Spalding?

A. Yes.

Q. Where did you reside or live in April of 1985?

A. We were temporarily living on Route 725, at a farm called Foxmeade.

Q. In April of 1985, did you, yourself, get stopped in a roadblock that was in front of the Evans-Smith entrance gate?

A. Yes.

Q. What occurred, and when did that occur?

A. I'm not exactly sure which day. I know that it was in the afternoon because I didn't go that way in the morning. I only travel that road in the afternoons. They asked if I had seen anything unusual on Monday morning, and I told them no, that I had not, because I didn't travel that road in the mornings.

Q. Did they stop you by his entrance gate?

A. It was very near that. As I remember, it was right at the entrance to the bridge, which is right., I guess, at his driveway.

Q. When you got home, did your wife tell you anything?

A. I know that she told me that she had talked to them, and that she had seen somebody. I don't remember exactly which night that occurred. But yes, she did

tell me that she had talked to the officers, and that she had seen somebody on the road early that morning.

Q. Do you recall what she told you that she had seen?

A. She told me that she saw somebody walking on the road near the entrance to the Evans-Smith property, and that the person appeared to be a blond haired male, wearing jeans, a jean jacket, and if I remember correctly, a ball cap that was pulled down over his eyes.

Q. And do you recall when she said she had actually seen this person?

A. I remember it to be as it turned out, the morning of the mishap.

Q. And the mishap being the murder of Barbara Evans-Smith?

A. That's right.

Q. Why is that? Why do you have that recollection?

A. I remember that it caused concern to me because we were living in a temporary house. I became concerned over security and whatnot, as far as keeping doors locked, windows locked, that sort of thing.

Q. Do you recall anything that you may have done the weekend prior to the murder of Barbara Evans-Smith?

A. Yes. I do. On Sunday afternoon a friend of mine came up, and it was one of those real nasty days, there was nothing to do, so we went fishing under the bridge. We took my wife's young daughter fishing under the bridge right in front of the Evans-Smith's driveway.

Q. If you would come down and show the Court. I believe the bridge shows itself

on this one. This is Route 725.

THE COURT: Mr. Spalding, could you kind of just move to the side.

Q. And can you locate the bridge on this?

A. (Indicating).

Q. And that would have been the bridge that you were fishing under?

A. Uh-huh.

MS. VANCE: I have no further questions of this witness. If you would answer Mr. McLees' questions.

THE COURT: Come on up and have a seat right back here.

CROSS-EXAMINATION ON BEHALF OF THE RESPONDENT

BY MR. MCLEES:

Q. Mr. Spalding, you had this conversation with your wife about what she had seen the evening of April 16th; is that correct?

A. The 16th being which day?

Q. Tuesday.

A. Tuesday.

Q. Of 1985. Is that right?

A. With it being so long ago, I honestly don't remember. I remember the conversation, but I honestly don't remember whether it was Monday night or Tuesday night.

Q. You can't really remember one day or the other?

A. No. I distinctly remember the conversation, but not exactly which day.

Q. Did you make any notes of this conversation?

A. Notes?

Q. Yes, sir.

A. As in written notes?

Q. Yes. Did you note down what your wife had said to you?

A. No.

Q. Have talked to her again about it since that time?

A. About the conversation?

Q. Yes, sir.

A. We may have talked about it during the trial. Recently no, we haven't really discussed it.

Q. So you are not sure, you may have talked about it during the first trial or the second?

A. To be honest with you, I didn't follow that trial.

Q. So you don't remember. Is it fair to say you don't remember talking with her about this again after that initial conversation?

A. I know that we must have talked about it, probably several times. I can't be specific on when. But during the course

of the trial, I'm sure that we discussed what we had at least, or what she had at least reported.

Q. You testified, if I recall correctly, that the reason you remember this conversation with her is because you were concerned about security at the place where you were living, so close by where this murder had occurred?

A. That's correct.

Q. And your concern, I guess, was because a murder had occurred close by?

A. Exactly.

Q. Isn't it fair to say you would have been concerned, regardless of what she had seen, or whether she had seen anything, if a murder had occurred close by, and there was some indication that somebody at least maintained that somebody had broken in and murdered someone.

A. That's a safe assumption; yes.

MR. MCLEES: Thank you, sir. I have no further questions.

THE COURT: Ms. Vance, anything further?

MS. VANCE: Yes, I do.

REDIRECT EXAMINATION ON
BEHALF OF THE PETITIONER

BY MS. VANCE:

Q. When you got home from work the day that you were stopped, do you recall what day of the week that may have been?

A. I'm almost sure the day that I was stopped was a Tuesday.

Q. And it was that evening when you got home that you spoke to your wife about her observations?

A. The day that she was stopped I know is the day that we talked about it,

because at that time I had also been stopped.

Q. Do you specifically recollect what her observation was about the date?

A. About the date.

Q. About the date when she saw the person on the road?

A. That it was the morning of, evidently it was Monday morning that she had seen the person on the road.

Q. Did she tell you that it was perhaps the previous Friday or Thursday?

A. That couldn't have been.

MS. VANCE: Very good. Thank you.

MR. MCLEES: Could I just recross briefLy in light of that?

THE COURT: Yes, sir.

RECROSS-EXAMINATION ON
BEHALF OF THE RESPONDENT

BY MR. MCLEES:

Q. Sir, are you sure that she told you she had seen the individual that morning, or was it that she and you were afraid that it was that morning she had seen the individual, that she was concerned that she may have seen someone connected with this crime?

A. There's no question in my mind that the morning she had seen the person was Monday morning. The thing that I'm not clear on was what day that she and I were stopped and questioned by the officers.

Q. So you can't remember exactly when it was that these things happened to you, but you're sure you can remember when she saw somebody else on the road?

A. I do remember that, because that became the cause for my concern.

Q. You were concerned that she may have seen someone involved in this crime; is that right?

A. Yes.

MR. MCLEES: Nothing further.

THE COURT: Ms. Vance.

MS. VANCE: I have nothing further.

THE COURT: Mr. Spalding can be excused; can't he?

MS. VANCE: Yes, he may.

MR. MCLEES: Your Honor, before we excuse him, may I inquire if Mrs. Spalding is still here, may I ask her a couple of other questions?

THE COURT: She's sitting in the back of the courtroom, I believe.

MR. FISCHEL: The rule may have been violated, but we'll waive it.

THE COURT: Will you waive it?

MS. VANCE: Yes, sir.

THE COURT: Mr. Spalding, that means you can step down. You're free to go, or you can stay in the courtroom, whatever you would like to do.

(The witness was excused.)

THE COURT: Would this be in the way of cross-examination?

MR. MCLEES: Yes, sir.

THE COURT: Is it agreeable if we can just recall her right now?

MS. VANCE: Absolutely.

THE COURT: Mrs. Spalding, could I ask you to come back up here on the witness stand, please.

Go ahead, Mr. Mclees.

KAREN LYNNE SPALDING,

a witness, recalled for examination by counsel for the Respondent, and, after

having previously sworn by the Clerk, was examined and testified as follows:

FURTHER CROSS-EXAMINATION ON BEHALF OF THE RESPONDENT

BY MR. MCLEES:

Q. Mrs. Spalding, to direct your attention again to your interview with Special Agents O'Conner and Rowland on September 17th of last year in your home, I had asked you, was it not a fact that they asked you what was it that you told Deputy Merchant, and I read you a paragraph of your response, a summary of what you told him. Would you like me to read that again to refresh your recollection?

A. A description of the person?

Q. Yes, ma'am. Your account of what you had seen.

A. Yes.

Q. To refresh your recollection, your testimony, would you agree that you told him, I told him that I had seen somebody on the road the day before, two days before. I told him it was a man about in his late 20s or early 30s, he had jeans on, a jean jacket. He was just walking down the road towards Lincoln because he was walking in the same direction I was driving, so he was on the passenger's side. I went past him. He didn't notice, and he wasn't hitchhiking or anything like that. He was just walking with his head down, and I just remember seeing blond hair. That was your initial synopsis. Do you still agree that's accurate?

A. Right.

Q. Were you not then asked, you said that you had seen him a day or a few days before, and did you not then respond, yes,

I couldn't remember. Well, when I first said, I guess it was when I told Ann what happened, I didn't know or didn't remember. I knew what day I was stopped by Mr. Merchant, and it was that day, the same day he called me. It would have been the day before that I saw the man. Was that your response to that question?

A. Right.

Q. And were you then asked by Special Agent Rowland, so you are saying, and then did you not respond, I just remember that it was like a few days before, or a day before. I don't remember. I know she was killed on a Monday, so it couldn't have been Sunday that I saw him, unless I saw him that Monday morning. I don't know. I mean, I don't remember now. I remember seeing him, but I don't know which day

because I don't know which, you know what I'm trying to say. Is that your response? A. Yes.

MR. MCLEES: Thank you. I have no further questions.

THE COURT: Ms. Vance, Mr. Fischel, I hate to break it up there. Mr. McLees is finished. Was there anything further you wanted to do?

MS. VANCE: I have nothing further, Your Honor.

THE COURT: You can step down. Thank you. (The witness was excused.)